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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JACOBS MANUFACTURING COMPANY,
Petitioner,

v.

SAM BROWN COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals' reinstatement of a jury verdict including $2.7 million in punitive damages, where the district court had ordered a new trial on all issues after finding that the jury verdict was directed by emotion rather than reason, departed from this Court's settled rule that the district courts have broad discretion to order new trials, and thereby violated the standards for procedural due process required by this Court's decisions assessing the constitutionality of punitive damage awards.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 1a-15a) is reported as 19 F.3d 1259. The opinion of the district court (App., *infra*, pp. 16a-53a) is reported as 792 F. Supp. 1520.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1994. By order dated June 27, 1994, the court of appeals denied a timely petition for rehearing and denied a suggestion for rehearing *en banc*, with two

judges dissenting (App., *infra*, p. 54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents the important question whether, under the Due Process Clause, a district court's ruling granting a new trial on all issues upon its finding that a jury verdict including an award of substantial punitive damages was directed by emotion rather than reason, can nevertheless be reversed by a court of appeals under a standard of review other than the abuse-of-discretion standard prescribed by this Court.

The pertinent facts can be summarized as follows: Since the early 1960s, Jacobs Manufacturing Company ("Jacobs")[1] manufactured the Jake Brake, a truck engine retarder which supplements the function of standard wheel brakes. Originally, Jacobs sold its Jake Brake directly to truck and engine manufacturers (Tr. 240, 271-73).[2] However, in about 1970, Jacobs began to develop a network of independent distributors to promote and sell the Jake Brake (Tr. 271-73). Under the distributorship agreement, Jacobs retained the right to sell directly to original equipment manufacturers (SBC App. 54; Brown Tr. 88-89), and Jacobs in fact exercised that right during the subsequent years. All of the distributorship agreements were for one-year terms and were renegotiated an-

[1] Pursuant to Rule 29.1, Petitioner Jacobs Manufacturing Company is now known as Matco Tools Corporation. Petitioner is a wholly-owned subsidiary of DH Holdings Corp., which is a wholly-owned subsidiary of Danaher Corporation. Petitioner has no non-wholly-owned subsidiaries.

[2] Record citations are to trial testimony ("Tr."), Bernard Brown's specific testimony ("Brown Tr."), SBC's closing argument ("SBC Cl. Tr."), SBC's appendix to its brief to the court of appeals ("SBC App."), SBC's addendum to its appendix to the court of appeals ("SBC Add."), and Jacobs' appendix to its brief to the court of appeals ("J. App."). For the convenience of the Court, we are lodging copies of the cited pages of these documents with the Clerk.

nually (SBC App. 54; Brown Tr. 88-89). By 1975, Jacobs had contracted with 70 distributors in North America (SBC App. 48).

In 1976, Jacobs approached the Sam Brown Company ("SBC") to serve as one of its distributors. SBC was a successful distributor of industrial engines and truck parts (Brown Tr. 6-10), and had distributed products for over 100 companies, including TRW, Rockwell International, and Firestone (Brown Tr. 8; J. App. 2). SBC's owner and CEO was Bernard Brown, who had joined his father in the business in 1946 after receiving a college degree in economics and business administration (Brown Tr. 2-3, 5). During his 30 years at SBC, Brown served as the company's chief managing officer and president, made major personnel and purchasing decisions, and reviewed and negotiated numerous contracts (Brown Tr. 3-5). By his own admission, Brown was a "knowledgeable and experienced businessman" (Brown Tr. 3-4).

In April of 1976, SBC and Jacobs entered into a distributorship contract. As in all of Jacobs' other distributorship agreements, the contract was for a one-year term and reserved Jacobs' right to sell directly to original equipment manufacturers. Moreover, the agreement allowed for termination of the distributorship without cause on 30-days' notice, specified that the contract was the sole agreement between the parties, and precluded oral amendments (App., *infra*, p. 22a). Brown read the contract and understood these provisions (App., *infra*, p. 22a; Brown Tr. 425, 438). Over the next eight years, the parties revised the contractual terms regarding territorial coverage and minimum sales requirements to reflect SBC's performance over the preceding year (SBC App. 54; Tr. 1165-66, 1195-96). However, all of the succeeding contracts retained the basic provisions of the original distributorship agreement: the one-year term, the termination-without-cause provision, Jacobs' right to conduct direct sales, and the integration clause (App., *infra*, pp.

22a, 45a). Brown read each of the contracts before signing them on behalf of SBC (Brown Tr. 425, 438).[3]

In the early 1980s, two economic developments compelled Jacobs to adopt a new business policy with respect to its distributors. First, the 1981-82 recession engulfed the trucking industry and drove more than half of Jacobs' distributors out of business. Second, the patent for the Jake Brake expired in 1982. As a result, the Cummins Engine Company, the largest engine manufacturer in North America, began to test its new "C-Brake," which employed the same technology as the Jake Brake. The development of the C-Brake threatened significant new competition for Jacobs (Tr. 984-85). Accordingly, in September 1983, Jacobs wrote to its 31 remaining distributors to inform them that it would begin to add new distributors. Jacobs also notified its distributors that, as a result of the new competition and pressure from original equipment manufacturers, Jacobs would henceforth offer the Jake Brake directly to the manufacturers at the same price that it charged to the distributors (Tr. 1066). The distributorship agreements expressly reserved Jacobs' right to make direct sales. Jacobs adopted these new policies because it believed that it had to accede to the manu-

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[3] Like most businesses, Jacobs regularly reviewed its operations to improve efficiency. As part of these reviews, Jacobs periodically considered alternative means to market the Jake Brake. As early as 1974, the head of Jacobs' sales department proposed to replace the distributors with company-owned distribution facilities (SBC App. 48-49), and in 1979, Jacobs hired an independent consultant to visit several distributorships, including SBC, and review Jacobs' distribution method (SBC App. tab 45; Tr. 1034, 1036-1037). In 1981, Jacobs retained Bain and Company to further study the marketing of the Jake Brake, and Bain recommended that Jacbos substitute an in-house sales force for the independent distributors (SBC App. tab 52 at 100-03). However, Jacobs never implemented any of these suggestions (Tr. 540-41, 975-76, 981-982). In fact, up to the time of the trial of this case, Jacobs maintained its extensive network of distributors (Tr. 1214).

facturers' demands in order to secure their patronage before Cummins entered the market (Tr. 965).

Although there was unchallenged evidence that SBC knew a year earlier that such a change was likely and had nonetheless signed another distributorship agreement (App., *infra*, p. 23a), SBC was the sole distributor which refused to accept Jacobs' new policies when announced. The other 30 distributors renewed their agreements in 1984 (Tr. 1214).[4] After Jacobs' announcement, SBC placed a large order for Jake Brakes (J. App. at Tab 7), but SBC continued to refuse Jacobs' overtures to renew its distributorship agreement. When Jacobs representatives traveled to SBC's offices on three separate occasions between December 1983 and March 1984, Brown rebuffed them each time, stating only that Jacobs did not "live up to [its] commitments" (Tr. 1210) and that SBC could not continue to profit as a Jake Brake distributor (Brown Tr. 264). Ultimately, SBC refused to pay for its final order of Jake Brakes, which it had received and resold for more than $400,000 (Tr. 1204, Brown Tr. 322, 402-03).

A. Proceedings in the District Court

In 1984, Jacobs commenced this diversity action in the United States District Court for the Western District of Missouri to recover the amount SBC owed to Jacobs for its final order of Jake Brakes. In response, SBC not only denied liability but asserted nine separate counterclaims against Jacobs, two of Jacobs' officers, and Jacobs' parent company (SBC App. Tab 3). After two years of discovery, the district court (Bartlett, J.) dismissed SBC's counterclaims against the two individual defendants, Jacobs' parent, and several of the other counterclaims. In August 1990, the case proceeded to trial before a jury on Jacobs' complaint and on SBC's counterclaims for fraudulent and negligent misrepresentation. SBC contended that, not-

[4] As of the time of trial, 21 of the other 30 distributors existing in 1983 remained Jacobs distributors (Tr. 1214).

withstanding the one-year-term, termination-without-cause, and integration clauses of the written distributorship agreements, Jacobs gave it various oral assurances that SBC's distributorship would remain forever secure. Specifically, SBC alleged that Jacobs represented: (1) after SBC became a distributor in 1976, that Jacobs was not considering any plans to change its existing method of distribution; (2) in July 1981, that Jacobs had no plans to change its distribution method; and (3) in and after July 1981, that if SBC remained a distributor during the recession, its distributorship would continue when the market rebounded (App., *infra*, p. 5a.).

At the close of the evidence, the district court directed a verdict for Jacobs on its complaint for the amount SBC owed it on its final order of Jake Brakes. However, the court reserved ruling on Jacobs' motion for a directed verdict on SBC's counterclaims (App., *infra*, p. 17a). The jury thereafter returned verdicts against Jacobs for nearly $2.5 million in compensatory damages and $2.7 million in punitive damages. The jury found that Jacobs made all three misrepresentations fraudulently, and made the third one negligently as well. Jacobs thereafter renewed its motion for directed verdict, moved for judgment notwithstanding the verdict (JNOV) and moved for a new trial on all issues submitted to the jury as a result of SBC's counterclaim.

After lengthy consideration, the district court issued an opinion setting aside the verdict and granting all of Jacobs' motions for directed verdict, JNOV and new trial (*id.* at 16a-23a). The court began with a thorough evaluation of the directed verdict and JNOV motions under the same standard of review (*id.* at 17a-18a). The court first determined that none of the three alleged fraudulent misrepresentations should have been submitted to the jury (*id.* at 17a-26a). The court found no evidence from which a reasonable jury could have concluded that the second and third representations were false when made (*id.* at 20a-21a). Moreover, the court found no evidence to sup-

port the conclusion that Brown, an educated and experienced businessman, could have relied on any of the alleged oral representations, because they directly conflicted with the clear and express provisions of SBC's written distributorship agreements, notably the one-year-term, termination-without-cause, and integration clauses (*id.* at 22a-24a). The district court found that SBC had misled the jury as to the significance of the agreements. As the district court stated (*id.* at 22a):

> Brown's constant repetition of "boiler-plate" when combined with a disdainful tone of voice, communicated to the jury that the words in the agreement were meaningless. In fact, these were provisions that Brown, as president of the defendant, agreed to and that Jacobs and defendant Brown intended to govern their relationship.[5]

The court also found that "there was unchallenged evidence that [in 1982] Brown knew Jacobs was considering changes in its method of distribution but that Brown went ahead and signed another agreement" (*id.* at 23a). This evidence included a letter in which Jacobs explicitly informed SBC that: "Future market conditions and demands may require a change in the manner in which Jacobs satisfies the requirements of [manufacturers]" (*id.*).[6]

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[5] Brown, for example, referred to the distributorship agreements as "a printed form with some boilerplate" (Brown Tr. 436) and referred to individual provisions of the written agreement as "just part of the boilerplate" (*id.* at 428, 410). SBC and its counsel also made light of the one-year-term, integration clause and other standard provisions of the written distributorship agreements as merely "boilerplate" (SBC Cl. Tr. 20; Brown Tr. 410, 428, 438).

[6] The court likewise concluded that the negligent misrepresentation claim should not have been submitted to the jury because no reasonable jury could have concluded that Brown justifiably relied on the statements at issue, and because Missouri law does not recognize a cause of action for negligent misrepresentation of future intent (App., *infra*, pp. 25a-26a).

Even on the assumption that SBC's misrepresentation claims were properly submitted to the jury, the district court vacated the jury's compensatory damage award, finding that SBC's alleged lost future profits were not proximately caused by any misrepresentation by Jacobs (*id.* at 29a-30a). The court then vacated the $2.7 million punitive damage verdict for utter lack of evidentiary basis (*id.* at 43a-45a). Applying the Alabama review factors which this Court approved in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991),[7] the district court determined: "Even if the fraudulent misrepresentation claim had been properly submitted, punitive damages of $2.7 million in this case can only be the result of passion and not the result of the exercise of reasoned discretion" (*id.* at 44a-45a). As the court explained (*id.* at 45a):

> Each year the defendant, through its highly educated, experienced president, with ready access to legal counsel, agreed in writing to the terms that would govern the business relationship with plaintiff. . . . Instead of the written agreement, defendant contended that it took sales talk, e.g. "we expect our relationship to last forever," as a promise and relied upon it over the terms of the written agreement. Under these facts, a reasonable jury could not fairly

[7] These factors were: (a) whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the financial position of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. (App., *infra*, p. 44a, quoting *Haslip*, 499 U.S. at 21-22.)

> conclude that plaintiff's conduct was either outrageous or so reckless as to permit an inference of evil motive.

Finding that the $2.7 million punitive award bore "no rational relationship" to any harm which Jacobs caused or was likely to cause, the court concluded that "the amount of punitive damages awarded by the jury was so unrealistic as to demonstrate irrational rather than rational behavior" (*id.* at 45a).[8]

Finally, "in order to facilitate complete review on appeal" (*id.* at 49a), as required by Fed. R. Civ. P. 50 (c)(1), the district court ruled on Jacobs' motion for a new trial even though it had granted Jacobs' motion for JNOV. The court began by stating the proper standard for granting a new trial—the jury's result must be "seriously erroneous" and without substantial evidentiary support—and explicitly recognized that the court must not usurp the jury's function (*id.* at 49a-50a, 52a). Applying this standard, the court ordered a new trial in light of its conclusions in granting JNOV (*id.* at 50a). The court specifically reiterated that there was simply no substantial evidence to support the jury's award of punitive damages, and further found the jury's fraudulent and negligent mis-

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[8] Citing this Court's instruction that district courts should review punitive damage awards "to determine whether the verdict is within the confines set by state law," *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (App., *infra*, p. 41a-42a), the district court further found that the punitive damages award was in fact not within the confines of Missouri law. The court determined that the Missouri Supreme Court's approved jury instruction for imposing punitive damages did not clarify Missouri's requirement that such damages bear a reasonable relation to the actual harm and the conduct causing the harm (*id.* at 42a). Thus, the court reasoned that the instruction did not afford the jury adequate guidance in determining the amount of punitive damages, which violated this Court's holding in *Haslip* (499 U.S. at 20) that the jury's discretion must be "exercised within reasonable constraints" to satisfy due process (App., *infra*, p. 40a).

representation verdicts inconsistent, which required retrial on both issues. Moreover, the court found that the jury improperly and without evidentiary basis listed two Jacobs employees in response to certain special interrogatories, which constituted "another indication that the jury was not following instructions but was proceeding by emotion" (*id.* at 52a). As the district court concluded (*id.* at 52a-53a):

> For all of the reasons set forth in this opinion, the jury reached a seriously erroneous result in this case under the evidence presented to it. Emotion rather than reason appears to have directed this jury. In fact, defendant's case on its counterclaim appeared to be based to a large extent on appeals to emotion as a means of avoiding the terms of written agreements. Repetition of concepts like small company versus big company, local company versus foreign company and "boilerplate" distracted the jury from a rational consideration of the evidence and from a careful application of the law as stated in the instructions.

B. Proceedings in the Court of Appeals

The court of appeals reversed both the district court's grant of judgment as a matter of law (JAML)[9] and the grant of a new trial to Jacobs on SBC's counterclaims and reinstated the jury's verdicts in their entirety.[10] The court began by reviewing the JAML under the same standards which governed the district court (*id.* at 6a). Viewing the evidence in the light most favorable to SBC, the court reversed the district court's individual judgments that there was no evidence to demonstrate that the second and

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[9] In accordance with the 1991 amendment to Fed. R. Civ. P. 50, the court of appeals substituted the term "JAML" (judgment as a matter of law) for the district court's references to "directed verdict" and "JNOV."

[10] The court of appeals affirmed the district court's grant of JAML on Jacobs' complaint (App., *infra*, p. 15a).

third misrepresentations were false when made; and that there was no evidence that Brown justifiably relied on any of the representations; and that the misrepresentations proximately caused the compensatory damages (*id.* at 6a-10a). As to the punitive damage award, the court of appeals summarily stated that: "Having carefully reviewed the record, we conclude the jury's punitive damage award bears a reasonable relationship to Brown's injury" (*id.* at 11a). The court of appeals held the $2.7 million punitive damage award "[was] not so excessive or unreasonable that it shocks our constitutional sensibilities or could have only resulted from irrational jury behavior" (*id.* at 12a).[11] The court, however, did not address the district court's finding that SBC had inflamed the jury with repetitive prejudicial appeals.

The court of appeals then addressed the district court's grant of a new trial on liability and damages. Failing to recognize that the proper standard for appellate review of the district court's grant of a new trial was whether the district court abused its discretion, the court reversed the district court's finding that the jury responded emotionally rather than rationally (*id.* at 13a). In so ruling, the court questioned whether the district court applied the proper standard in granting Jacobs' new trial motion, even though the district court correctly stated the correct standard for ordering a new trial, i.e., the jury verdict must be "seriously erroneous" and without evidentiary support (*id.*). In setting aside the district court's grant of a new trial and reinstating the $5.2 million verdicts against Jacobs in their entirety, the court of appeals did not conclude that the district court abused its discretion in ordering a new trial. Rather, the court of appeals undertook a *de novo* review which accorded

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[11] The court also reversed the district court's determination that the Missouri instruction for assessing punitive damages violated due process because it failed to adequately confine the jury's discretion in determining the amount of such damages. *See* n.8, *supra*.

no deference to the district judge's firsthand observation of the conduct of the trial. Without further elaboration, the court of appeals concluded that: "The district court could not properly grant a new trial in this case. We thus need not remand, but simply reverse the district court's conditional grant of a new trial" (*id.* at 14a).

REASONS FOR GRANTING THE PETITION

The court of appeals' reinstatement of the substantial punitive damage award in this case, despite the presiding trial judge's grant of a new trial after explicitly finding that the jury verdict was directed by emotion rather than reason, represents the same type of departure from traditional procedures that this Court found constitutionally defective last Term in *Honda Motor Co., Ltd. v. Oberg,* 114 S. Ct. 2331 (1994). Under traditional procedures, this Court has made it clear that motions for a new trial are entirely committed to the sound discretion of the district court and not subject to *de novo* review where the motion is based upon the conduct of the trial and the fact that the jury verdict was the product of passion or prejudice. The decision below sharply conflicts with this principle and thereby violates the Due Process Clause. This Court should therefore grant certiorari and reaffirm to the courts of appeals that the proper standard of appellate review in such cases requires deference to the presiding trial judge's broad discretion to order a new trial based upon his personal observation of the conduct of the trial, rather than the *de novo* review undertaken by the court below.[12]

1. In *Honda Motor Co., Ltd. v. Oberg, supra,* this Court reaffirmed that the Due Process Clause of the Constitution imposes limits on punitive damage awards.

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[12] Jacobs seeks certiorari only with respect to the court of appeals' ruling reversing the district court's grant of a new trial on liability and damages. We do not seek review of the reversal of the district court's grant of JAML.

See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, supra, 499 U.S. 1; *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). Although the Court acknowledged that there is no mathematical bright line for distinguishing between the constitutionally acceptable and the constitutionally unacceptable, it emphasized that a punitive damage award could only pass constitutional muster if it were subject to "meaningful and adequate review by the trial court" and "subsequent appellate review," particularly where passion influenced the verdict. *Pacific Mut. Life Ins. Co. v. Haslip, supra,* 499 U.S. at 20; *Honda Motor Co., Ltd. v. Oberg, supra,* 114 S. Ct. at 2335.

Honda focused on the Oregon state courts' departure from traditional procedures. In *Honda,* the Court reaffirmed that the Constitution requires searching judicial review of punitive damage awards, particularly where passion directed the verdict. After setting forth the lengthy history of judicial review of punitive damage awards at common law, the Court found that judicial review has "safeguard[ed] against excessive verdicts for as long as punitive damages have been awarded" (*id.*). Specifically, the Court noted that the common law courts in America had long reviewed punitive damage verdicts for passion, prejudice or partiality, and would regularly infer passion or prejudice from the size of the award (*id.*). at 2237. As the Court observed (*id.* at 2340-41):

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presence.

Because the Oregon Constitution explicitly precluded the state appellate courts from setting aside a jury verdict for

punitive damages where the only basis for relief was the amount of the award, the Court held that the $5 million punitive damage award in that case violated the Due Process Clause of the Fourteenth Amendment.

In reversing the trial court's grant of a new trial and reinstating the punitive damage award in this case, the court of appeals unconstitutionally departed from traditional procedures in the same manner as the Oregon courts in *Honda*. Here, the presiding trial judge found that passion and emotions, rather than reason, directed the jury's assessment of $2.7 million in punitive damages. After observing the conduct of the trial and the demeanor of the witnesses, the trial court concluded that the jury's verdict "can only be the result of passion" (App., *infra*, p. 45a), that the jury demonstrated "irrational rather than reasonable behavior" (*id.*), and that "[e]motion rather than reason" directed the jury (*id.* at 53a). In these circumstances, the trial court exercised its broad discretion and ordered a new trial. The court of appeals, however, jettisoned the trial court's review and reinstated the jury's verdict, without deferring either to the trial court's broad discretion to order a new trial or to its specific finding that emotion provoked the punitive damages award. In *Honda*, judicial review of the size of a punitive damage award was entirely foreclosed even though the size of the award supported the inference that it was based on prejudice. The net effect in both cases is precisely the same—the absence of proper post-verdict review deprived a defendant of due process of law and subjected it to a punitive damage award that was the product of passion and prejudice.

The court of appeals' failure to accord any deference to the trial court's finding that the jury was influenced by emotion and prejudice therefore constitutes a sharp departure from traditional procedures that is unconstitu-

tional under this Court's *Honda* ruling. Indeed, in this respect, the decision below cannot be squared with *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal Co., supra.* There, this Court held that a trial court's broad discretion to order a new trial applies specifically to the case in which punitive damages are sought. As the Court there stated (492 U.S. at 279 (emphasis added)):

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. *The court of appeals should then review the district court's determination under an abuse-of-discretion standard.*

Although the Court in *Browning-Ferris* upheld the trial court's denial of a motion for a new trial, the abuse-of-discretion standard applies equally where, as here, the trial court orders a new trial after finding that the jury's punitive damage verdict was based upon passion or prejudice. In such a case, the Court made it clear that "it is not disputed that a jury award may not be upheld if it was the product of bias or passion . . . ." (*id.* at 276).

Here, the court of appeals did not apply the prescribed abuse-of-discretion standard in reviewing the trial court's order of a new trial. Instead, the court of appeals ignored the careful post-trial scrutiny which the district court undertook in accordance with this Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip, supra.*[13] Nor did

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[13] The Alabama procedures which this Court found constitutionally acceptable in *Haslip* were as follows: First, the Alabama trial court had adequately limited the jury's discretion to impose punitive damages by instructing the jury to tie the amount of any punitive award to the nature of the wrong. Second, the trial court applied certain factors in its post-verdict review which the Alabama Supreme Court had approved as indices of disciplined scrutiny. Third, the Alabama Supreme Court itself reviewed the verdict to ensure that the award did not undermine the State's goals of punishment

the court of appeals even address, much less respect, the trial court's explicit finding that the punitive damage award was based upon emotion rather than reason. Specifically, the trial court found that SBC's repeated references to Jacobs' size and non-resident status inflamed the jury to render a substantial punitive damage verdict that was utterly unrelated to Jacobs' actual conduct. This finding by the trial court that the jury verdict, was based upon passion, prejudice and xenophobia is particularly entitled to deference given the fact that a majority of the members of this Court agreed in *TXO Production Corp. v. Alliance Resource Corp., supra,* that large, out-of-state corporations face an extra risk of prejudice in punitive damage cases. Indeed, in *TXO,* three Justices expressed the view that the plaintiff's direct and repeated reminders to the jury that the defendant corporation was out-of-state "converted that grave risk of prejudice into a near certainty" (O'Connor, J., dissenting; 113 S. Ct. at 2738). Nor is the size of the award determinative. "When a punitive damage award reflects bias, passion or prejudice on the part of the jury, the Constitution has been violated, no matter what the absolute or relative size of the award" (Kennedy, J., concurring; 113 S. Ct. at 2725). "Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand" (O'Connor, J., dissenting; 113 S. Ct. at 2729).

In sum, under this Court's punitive damage decisions, the court of appeals violated Jacobs' right to due process by reinstating the punitive damages verdict in the face

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and deterrence (499 U.S. at 19-22). Following these Alabama procedures, the district court found it had erred in failing to instruct the jury to link the amount of punitive damages to the actual harm and conduct at issue (App., *infra,* pp. 39a-42a); *see* n.8, *supra,* and also found the jury's award lacking under the approved Alabama review factors (App., *infra,* pp. 44a-45a); *see* n.8, *supra.* The court of appeals summarily reversed both conclusions (*id.* at 10a-12a).

of the trial court's findings that the jury's verdict was infected with emotion and prejudice, and its further finding that the punitive damage award "[bore] no rational relationship to the harm likely to result or to the harm that actually occurred" (App., *infra*, p. 45a). Due process demands that the presiding trial judge's finding and his conclusion that justice required a new trial on liability and damages be accorded deference because he personally observed the conduct of the trial.[14]

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[14] In reinstating the verdict, the court castigated the district court for not explaining its reasons for granting a new trial and for referring instead to the reasons it "previously discussed" in granting JAML. The court of appeals inferred therefrom that the district court may have applied the JAML standard in awarding a new trial (App., *infra*, p. 13a). This criticism is wholly misplaced. The district court expressly acknowledged the new trial standard—whether the jury reached a "seriously erroneous result" (*id.* at 49a)—and expressly found that standard satisfied: "the jury reached a seriously erroneous result in this case under the evidence presented to it" (*id.* at 52a-53a). It is simply unreasonable to suggest that in ordering a new trial, the district court could not refer to the evidence it "previously discussed" in granting JAML; evidence leading to the conclusion that the jury reached a seriously erroneous verdict that was the product of passion and prejudice. At the very least, if the court of appeals remained uncertain as to the reasons for the district court's grant of a new trial, it should have remanded the case to permit the district court to elaborate those reasons instead of simply reinstating the verdict. Reinstating the verdict wihout seeking such an explanation effectively denied Jacobs a constitutionally mandated review of the verdict.

The court of appeals summarily concluded that the district court did not find Brown's testimony unworthy of belief (*id.* at 14a). That observation, based upon a strained and unfair characterization of the district court's opinion elevates form over substance. A fair reading of the district court's decision reveals that the court evaluated Brown's testimony in light of the terms of the distributorship agreements and his own considerable business experience and rejected it as self-serving and not worthy of belief. Moreover, the district court found that Brown repeatedly prejudiced the jury with inflammatory remarks designed to undermine the provisions of the distributorship agreements (*id.* at 22a, 53a). This is precisely the sort of prejudicial error which the trial court, and not the appellate court, is uniquely qualified to assess.

2. Wholly apart from the context of punitive damages, the decision below is contrary to the settled rule established by this Court's decisions over the last half century that trial courts possess almost complete discretion to order new trials, especially when such rulings are based upon the conduct of the trial itself. This Court has repeatedly instructed that "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *see McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Neese v. Southern Railway Company*, 350 U.S. 77 (1955); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). As the circuit courts of appeals have uniformly recognized,[15] in granting a motion for a new trial "[t]he trial court has very broad discretion and the appellate courts will defer a great deal to his exercise of discretion. This much is well settled." 11 Charles A. Wright & Arthur Miller, Federal Practice and Procedure: § 2818 (1973). The court of appeals in the instant case has itself recognized that a district court's new trial determination is to be accorded "[g]reat deference." *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673 (8th Cir. 1985).

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[15] *See, e.g., MacQuarrie v. Howard Johnson Co.*, 877 F.2d 126 (1st Cir. 1989); *Matthews v. CTI Container Transport Int'l, Inc.*, 871 F.2d 270 (2d Cir. 1989); *Gutzan v. Altair Airlines, Inc.*, 766 F.2d 135 (3d Cir. 1985); *Wadsworth v. Clindon*, 846 F.2d 265 (4th Cir. 1988); *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir. 1990); *Whittington v. New Jersey Zinc Co.*, 775 F.2d 698 (6th Cir. 1985); *Spanish Action Committee of Chicago v. City of Chicago*, 766 F.2d 315 (7th Cir. 1985); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir. 1990); *In re Hawaii Federal Asbestos Cases*, 871 F.2d 891 (9th Cir. 1989); *McHargue v. Stokes Div. of Pennwalt Corp.*, 912 F.2d 394 (10th Cir. 1990); *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991); *Grogan v. General Maintenance Service Co.*, 763 F.2d 444 (D.C. Cir. 1985); *Moxness Products, Inc. v. Xomed, Inc.*, 891 F.2d 890 (Fed. Cir. 1989).

The reason for this time-honored rule is self-evident: the trial judge is present in the courtroom to observe the nature of the trial, the behavior of counsel, and the demeanor of the witnesses; thus the trial judge is in a far superior position to determine whether a trial has been fundamentally fair than an appellate court reviewing a cold record. Wright & Miller, *supra*, § 2818 ("The trial judge [i]s on the spot and is better able than an appellate court to decide whether [any] error affected the substantial rights of the parties."). This is particularly true of a trial court's ability to assess whether a jury is prejudiced. *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) ("[T]he determination of [a jury's] impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.")

It follows from the trial court's broad discretion to grant a new trial that an appellate court may only review such a grant for a clear abuse of discretion. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, *supra*, 492 U.S. at 279. Indeed, the court below has itself previously recognized that the reversal of a district court's new trial grant requires a "strong showing of abuse." *Brown v. Syntex Laboratories, Inc.*, *supra*, 755 F.2d at 673; *see Lowe v. E.I. DuPont de NeMours & Co.*, 802 F.2d 310 (8th Cir. 1986). An abuse of discretion, in turn, can only be found upon "a 'definite and firm conviction that the court below committed a clear error of judgment.'" *In re Eisen*, Nos. 92-15947, 92-15948 (9th Cir. Aug. 9, 1994); *see Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989); *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991). Thus, "appellate review of [a new trial] ruling is quite limited." Wright & Miller, *supra*, § 2803. In fact, at least one circuit has recently concluded that a grant of new trial for insufficiency of the evidence is unreviewable. *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 157-58 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 290

(1993); *see also Portsman v. American Home Prods. Corp.*, 201 F.2d 847, 848 (2d Cir. 1953) (L. Hand, J.)[16]

In this case, the court of appeals ventured far beyond its narrow scope of abuse-of-discretion review in reversing the district court's grant of new trial. The court of appeals' opinion does not betray even the slightest hint of deference to the district court's broad discretion to order a new trial. On the contrary, the court's opinion indicates that in reviewing the new trial order, it improperly continued to employ its *de novo* review of the district court's grant of JAML. *See* pp. 11-12, *supra*. Thus, the court neither articulated the proper abuse-of-discretion standard for reviewing the new trial grant nor did it expressly find any abuse of discretion by the trial court. Moreover, the court wholly failed to address the district court's finding that passion and prejudice inflamed the jury and governed the verdict. Simply put, the court of appeals wrongly denied Jacobs the benefit of the trial court's discretionary judgment that the first trial was unfair and a new trial was required. In so ruling, the court of appeals denied Jacobs the review which only the trial court was qualified to provide.

The court of appeals' failure to defer to the trial court's judgment is particularly egregious in the circumstances

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[16] Appellate courts must be particularly careful to apply the deferential abuse-of-discretion standard where, as in this case, the district court grants alternative motions for JAML and new trial pursuant to Fed. R. Civ. P. 50(b) and (c). In such a situation, an appellate court must not err by reviewing both grants under the same standard, because the standard of review is much more stringent for the grant of a new trial than for the grant of JAML. Wright & Miller, *supra*, §§ 2531, 2539. Specifically, the appellate court should review the grant of JAML *de novo* under the district court's standard, which is whether, considering the evidence most favorable to the non-movant, a reasonable jury could find for that party. *Estwick v. City of Omaha*, 9 F.3d 56, 59 (8th Cir. 1993). In marked contrast, the appellate court can only review the grant of a new trial for a clear abuse of discretion. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco, Inc.*, *supra*, 492 U.S. at 279; *Lowe v. E.I. Du Pont de Nemours, Inc.*, *supra*, 802 F.2d at 310-11.

of this case. While a district court's grant of new trial should always receive substantial deference, that is particularly true where the district court grants a new trial for reasons other than insubstantial evidence, for example, where the trial court determines that the jury has been prejudiced. *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646-47 (D.C. Cir. 1988); *Deas v. PACCAR, Inc.*, 775 F.2d 1498, 1504 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). In the latter situation, there can be no danger that the trial court is usurping the jury's function to weigh the evidence; rather, the judge is delivering the jury from an incorrect verdict over which it had no control. *Deas v. PACCAR, Inc., supra,* 775 F.2d at 1504. In the instant case, the trial court granted a new trial precisely because it determined that the jury's verdict resulted from passion and prejudice. (App. *infra*, p. 53a). This finding deserved special deference, and in the context of a punitive damages award, constitutional protection from the *de novo* review undertaken by the decision below.

The proper standard of appellate review in such a situation is well illustrated in *Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991). In that case, a jury returned a $5 million punitive damage award against an insurance company, but the district court found the award "so grossly inflated as to constitute a miscarriage of justice" (*id.* at 505), and granted alternative motions for JAML and a new trial as to the damage award (*id.* at 503). The court of appeals reversed the JAML (*id.* at 507). However, the court of appeals, *en banc*, properly recognized that the abuse-of-discretion standard governed its review of the new trial award and stated:

> [T]he district court found the punitive damages verdict was so excessive as to constitute a miscarriage of justice. We cannot say that the grant of new trial on the issue of the amount of punitive damages constituted an abuse of discretion. Whether we agree

> with the ruling of the district court is not at issue here, for we are constrained by the proper exercise of appellate review to affirm its decision. *Id.*

Likewise, the court of appeals in this case should not have substituted its after-the-fact opinion for the district court's first-hand judgment that justice required a new trial. The court of appeals' departure from traditional procedures has resulted in the reinstatement of a substantial punitive damage award. Since such a ruling cannot stand scrutiny under the Due Process Clause, the decision below requires review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 92-1834

THE JACOBS MANUFACTURING COMPANY,
Appellee,

v.

SAM BROWN CO.,
Appellant.

Submitted Dec. 17, 1992

Decided March 28, 1994

Before FAGG, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

FAGG, Circuit Judge.

This lawsuit arises from the breakdown of a distributor relationship between the Jacobs Manufacturing Company (Jacobs), a manufacturer of truck engine brakes, and Sam Brown Company (Brown), its largest distributor. After the relationship ended, Jacobs brought this diversity action for its unpaid account balance, and Brown counterclaimed asserting Jacobs made fraudulent and negligent misrepresentations. Brown appeals the district court's order granting judgment as a matter of law (JAML) to Jacobs. We affirm in part and reverse in part.

I.

In 1976 Jacob's representatives approached Brown's chief executive officer (CEO) to solicit Brown as a Jacobs distributor. Brown's CEO expressed concern about the distributorship agreement's one-year term and Jacob's right to sell directly to original equipment manufacturers. The representatives responded the agreement would last a "lifetime" if Brown performed well, the only original equipment manufacturer integrating Jacobs's products in Brown's territory would be Brown's account, and Jacobs would refer to Brown all original equipment manufacturer inquiries from Brown's exclusive territory. Assured this oral understanding was also part of the agreement, Brown's CEO signed the annual distributorship agreement. Brown became Jacobs's top distributor in North America. Each year after 1976, Jacobs sent Brown a new agreement with a letter from Jacobs's general sales manager stating that he was "sure [their] continued association [would] be long term and mutually beneficial." Brown signed the agreements each year until 1984. Jacobs repeatedly reassured Brown it would be a long-term distributor and promised to inform Brown about any developments affecting Brown's distributorship and expansion effort. With borrowed money, Brown invested more than one million dollars in developing its Jacobs distributorship to comply with Jacobs request that Brown have suitable physical facilities and trained service personnel available around the clock.

Contrary to its representations to Brown, Jacobs was considering changes to its distribution system. As early as 1974, Jacobs's five-year marketing plan called for an analysis of the advantages of directly marketing and servicing its products. In 1979, Jacobs hired a consultant to develop alternative distribution plans. Without disclosing this purpose, Jacobs's vice president asked Brown to give the consultant unlimited access to Brown's premises and business records. The vice president told Brown the reason for the consulant's visit was to allow the consultant

to find out how a Jacobs distributor operated. With Brown's cooperation, the consultant obtained knowledge of Brown's production and marketing practices and other confidential information, but assured Brown the information would not be disclosed.

Later, in June 1981, Jacobs received a commissioned report from a different consulting firm, Bain and Company. The Bain report stated that "[w]ith a very carefully staged, time-phased program, Jacobs could gradually eliminate almost all of the distributors." The Bain report recommended that Jacobs pursue the fleet program, eliminate the original equipment manufacturer distributor segment first, bring the distributor role in-house, and fully eliminate all external distributor segments by 1984. The report warned that to avoid loss of sales, goodwill, and image, distributors would have to be kept in place until Jacobs had its own direct sales system ready. A few days after receiving the Bain report, Jacobs executives studied the report at a hotel.

In July 1981, a month after receiving the Bain report, Jacobs encouraged Brown to continue financially supporting its Jacobs distributorship through a trucking industry recession that began in May 1980, promising Brown would be rewarded by future business when the recession ended. Jacobs's regional representative also assured Brown that their relationship was "like a marriage" and the distributorship would "go on and on." In September 1981, however, Jacob's in-house counsel sent a written inquiry to a Jacobs executive asking whether Jacobs was "still considering a change in its distribution system [that] will enable Jacobs to go direct and eliminate all distributors and middlemen."

Behind its false front of assurances to Brown, Jacobs began to implement the Bain report's recommendations. In 1982 Jacobs started a program of direct sales to Brown's truck fleet customers. After Brown sent Jacobs a letter complaining about the program, Jacobs responded

that the new program was merely a special promotion. Jacobs reassured Brown that Jacobs's short-range and long-range marketing strategies were not affected and that distributors would continue as the backbone of Jacobs's sales effort. Despite its assurances, however, Jacobs was analyzing a "Single Price Strategy" under which Jacobs would sell its products directly to any customer at the same price Jacobs charged its distributors, destroying the value of the distributorships. Nonetheless, Jacobs continued to urge Brown to maintain its distribution efforts through the recession, claiming both companies would benefit when the market rebounded. Jacobs's general sales manager admitted he knew about the Bain report and that Jacobs was considering changing its basic method of distribution as early as 1974, but never disclosed this information to Brown.

Consistent with the Bain report, when the recession ended in 1983 Jacobs unveiled its "Single Price Strategy," which Jacobs implemented by changing the annual distributorship agreements. Jacobs informed Brown in September 1983 that effective January 1, 1984, Jacobs would accept direct orders from original equipment manufacturers at the same prices offered to distributors, eliminate the distributors' exclusive territories, and reserve the right to sell directly to anyone at one price. Jacobs expanded its own sales and service force and in November 1983 directly solicited Brown's original equipment manufacturer and truck fleet customers, which together constituted 90% of Brown's customers for Jacobs's brakes. Jacobs fully realized the consequences of the distribution changes: Jacobs's 1983 Eastern Regional Annual Report declared, "[Jacobs's] announcement . . . of the 1984 Single Price Strategy irrevocably has changed the traditional role of our distributors. [They] must either change or die. Most will probably die."

In December 1983 Brown sent Jacobs a letter complaining that Jacobs's new policy would effectively destroy Brown's distributorship, and reminding Jacobs that Brown

had incurred heavy losses during the recession based on Jacob's assurances Brown would benefit when the market improved. Brown also stated it would be unable to recover the one million dollars it had invested in facilities and marketing for Jacobs's brakes. Jacobs did not respond to Brown's letter in writing, but a Jacobs manager noted on the letter that Jacobs should send "someone with rapport [to] visit [Brown's CEO and] give him a crumb." Because Brown could not profitably sell Jacob's products to customers who could buy directly from Jacobs at the same price, Brown refused to sign Jacobs's 1984 distributorship agreement.

II.

Jacobs filed this diversity action against Brown for the unpaid account balance owing for products sold to Brown when the distributor relationship ended. Brown denied liability and counterclaimed, alleging Jacobs made several fraudulent misrepresentations: (1) Jacobs's statements in and after 1976 that it was not considering any plans to change its existing distribution method; (2) Jacobs's assurance in July 1981 that it had no plans to change its existing distribution method; and (3) Jacobs's statements in and after July 1981 that, if Brown remained a Jacobs distributor during the market recession, Brown's distributorship would continue when the market rebounded. Following a fifteen-day trial, the district court granted Jacobs's JAML motion on its claim against Brown, and submitted Brown's counterclaims to the jury. The jury found all three Jacobs representations were fraudulent and the third representation was also negligent. The jury awarded Brown almost $2.5 million in actual damages, consisting of out-of-pocket losses and lost future profits, and $2.7 million in punitive damages.

Sixteen months after the jury returned its verdict, the district court granted Jacobs's renewed JAML motion on Brown's counterclaims. *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F.Supp. 1520 (W.D.Mo.1992). Without the benefit of the trial transcript, the district court concluded

there was no evidence from which the jury could reasonably infer that the second and third representations were false when made, *id.* at 1526, and as a matter of law, Brown could not justifiably rely on any of Jacobs's representations, *id.* at 1527. The district court vacated Brown's damage award for lost future profits, finding the profits were not proximately caused by Jacobs's first misrepresentation. *Id.* at 1530. The district court also vacated the punitive damages award, deciding the jury instruction violated due process because it did not adequately guide the jury in determining the amount of punitive damages, *id.* at 1536, the evidence did not support the award, *id.* at 1537, and the award resulted from irrational jury behavior, *id.* The district court also granted Jacobs's alternative motion for a new trial on Brown's counterclaims. *Id.* at 1539-40.

III.

Brown contends the district court erroneously granted Jacobs's JAML motion on Brown's fraudulent misrepresentation counterclaims. To establish fraudulent misrepresentation, Brown had to show, among other things, that Jacobs's representations were false when made and that Brown had a right to rely on the representations. *Crues v. KFC Corp.*, 729 F.2d 1145, 1148-49 (8th Cir. 1984) (applying Missouri law); *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 549 (Mo.Ct.App. 1983). Brown contends that, contrary to the district court's view, the evidence supports the jury's findings that Jacobs's second and third representations were false when made and that Brown justifiably relied on all three representations. We agree.

In reviewing the district court's grant of JAML, we apply the same standard that governed the district court. *See Estwick v. City of Omaha*, 9 F.3d 56, 59 (8th Cir. 1993). We consider the evidence and the reasonable inferences that may be drawn from the evidence in the light most favorable to Brown. *First Dakota Nat'l Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 808

(8th Cir. 1993). JAML should not have been granted unless all the evidence points one way and is susceptible of no reasonable inferences sustaining Brown's position. *Id.* at 808-09. The standard of review for JAML is the same under Missouri and federal law. *Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1288 n. 6 (8th Cir. 1991).

Under Missouri law, fraud may be inferred from facts and circumstances and need not be shown by direct evidence. *Glass Design Imports, Inc. v. Import Specialties,* 867 F.2d 1139, 1142 (8th Cir.1989); *Essex,* 661 S.W.2d at 551. Whether the facts and circumstances justify a conclusion that a defendant knows a representation is false when made is a question for the jury. *Essex,* 661 S.W.2d at 551. When a fraudulent misrepresentation claim is based on a statement of intent, the plaintiff establishes falsity by showing that when the speaker made the statement, the speaker did not intend to perform consistently with the statement. *See Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1218-19 (8th Cir.1985) (applying Missouri law), *cert. denied,* 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986). Although intent not to perform cannot be shown solely by the speaker's nonperformance, intent can be shown by other evidence. *Id.* at 1219.

In our view, a rational jury could find the second and third representations were false when made. This is so because, viewing the evidence in the light most favorable to Brown, the jury could reasonably infer Jacobs had decided to eliminate external distributors when it made these statements to Brown. Before 1981, Jacobs concealed distribution studies and deceived Brown about the purpose of a consultant's visit. The June 1981 Bain report recommended a carefully staged, time-phased program to eliminate Jacobs's distributors by 1984. Jacobs's later conduct and timing neatly coincided with the Bain report's recommendations. We believe the jury could reasonably infer that in June 1981 Jacobs secretly adopted

the Bain report's recommendation to eliminate the traditional distributors. Thus, a reasonable jury could find the second representation—Jacobs's assurances in and after July 1981 that it had no plans to change its distribution system—was untrue when made. A reasonable jury could also find that when Jacobs made the third representation, Jacobs did not intend that Brown would benefit from increased sales after the recession's end.

This leaves the issue of Brown's reliance on the three representations. Evidence that Brown continued to incur expenses to maintain its distributorship until Jacobs announced the changes in the distributorship agreement shows Brown relied on Jacobs's representations. *See Total Petroleum, Inc. v. Davis*, 788 F.2d 476, 481-82 (8th Cir. 1986) (applying Missouri law). A rational jury could also find that Brown's reliance was justified. The district court held that even assuming all three representations were false, Brown's reliance on the verbal representations was not justified as a matter of law because the verbal representations conflicted with the express terms of the written distributorship agreements. *See* 792 F.Supp. at 1526-27. This view is unsupported by Missouri law, however.

In a Missouri fraud case, it is for the jury to decide whether a party is entitled to rely on verbal representations that conflict with a written agreement. *Pinken v. Frank*, 704 F.2d 1019, 1024-26 (8th Cir.1983); *Essex*, 661 S.W.2d at 550. Thus, Brown's reliance on Jacobs's verbal representations could be justified, even though the verbal representations contradicted the distributorship agreements' one-year terms and reservation to Jacobs of the right to sell directly to original equipment manufacturers. Although Brown also knew Jacobs was selling products directly to Brown's truck fleet customers, Brown could justifiably rely on Jacobs's assurances that the program was temporary and Jacobs's distributors would continue as the backbone of Jacobs's sales effort. It was for the jury to decide whether Brown's reliance on Jacobs's

verbal representations was justified. *See Pinken*, 704 F.2d at 1024.

Because the jury's finding that all three representations were fraudulent supports the damages awarded, we need not consider whether Brown's negligent misrepresentation counterclaim was properly submitted to the jury.

IV.

Brown next contends the district court should not have vacated the award for lost future profits. We agree. The district court held damages for Brown's lost future profits, i.e., "benefit of the bargain" damages, were proper under Missouri law. 792 F.Supp. at 1528-29; *see Glass Design*, 867 F.2d at 1143; *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1220 (8th Cir.1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1191, 75 L.Ed.2d 436 (1983). The district court also held the future profits were not speculative. 792 F.Supp. at 1529; *see Riddle v. Dean Mach. Co.*, 564 S.W.2d 238, 257 (Mo.Ct.App. 1978). We agree with the district court's assessment of Missouri law, and Jacobs does not assert on appeal that lost future profits are not a proper measure of damages or that future profits were speculative. The district court concluded, however, that a reasonable jury could not have found the first representation proximately caused the loss of future profits, essentially because the district court viewed Brown's reliance on Jacobs's verbal representations as unjustified. 792 F.Supp. at 1530. Having already concluded there was no evidence that the second and third representations were false when made, the district court did not consider whether they proximately caused Brown's loss of future profits. *See id.*

We believe a reasonable jury could find that Brown's loss of future profits was a direct result of Jacobs's fraudulent misrepresentations. As we have already explained, a reasonable jury could conclude that the second and third representations were false when made and that Brown's reliance on Jacobs's verbal representations was

justified. Jacobs argues Brown's refusal to sign the 1984 distributorship agreement caused Brown's loss of future profits. This argument is misplaced. In the context of fraud, the purpose of "benefit of the bargain" damages is to compensate a defrauded party for amounts that would have been received if the situation had been as the defrauding party represented. *See Smith v. Tracy*, 372 S.W.2d 925, 938 (Mo.1963). Here, these damages compensate Brown for the money it would have made after the market recession ended if its distributorship had continued without change as Jacobs represented, i.e., without Jacobs's direct competition. It is clear to us that Brown's loss of future profits was a direct result of Jacobs's new distribution system, which prevented Brown from profiting from future business as Jacobs had promised Brown would. Although Brown refused to sign the distributorship agreement in 1984, Brown could not have profited even if it had signed the agreement because Jacobs's distribution changes eliminated Brown's ability to make any money. We conclude the district court abused its discretion in vacating the damages awarded for lost future profits.

Brown also challenges the district court's order vacating the punitive damage award. The district court instructed the jury that if it found Jacobs committed fraud with "evil motive or reckless indifference to [Brown's] rights . . ., [y]ou may award [Brown] an additional amount as punitive damages to punish [Jacobs] and to deter [Jacobs] and others from like conduct." Disagreeing with the Missouri Supreme Court's decision in *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989) (en banc), the district court concluded this instruction did not satisfy due process because it failed to guide the jury on determining the amount of any punitive damage award. 792 F.Supp. at 1533-35. "Specifically, the district court held the instruction failed to tell the jury that the amount of a punitive damage award must be reasonably related to the injury inflicted and the conduct that caused the injury. *Id.*

Missouri case law identifies many factors, including the existence of a reasonable relationship between the amount of punitive damages awarded and the injury inflicted, that restrict a jury's punitive damage decision. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 365-66 (Mo.Ct.App. 1993). We believe the district court was simply mistaken in holding the instruction itself must contain the limiting factors. Rather, trial or appellate court review based on the identified factors "imposes a sufficiently definite and meaningful constraint on the [jury's discretion] in awarding punitive damages" to satisfy due process. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22, 111 S.Ct. 1032, 1045, 113 L.Ed.2d 1 (1991); *see Carpenter*, 853 S.W.2d at 365-66. Having carefully reviewed the record, we conclude the jury's punitive damage award bears a reasonable relationship to Brown's injury. *See Finley v. Empiregas, Inc.*, 975 F.2d 467, 472 (8th Cir. 1992) (applying Missouri law). We thus conclude the jury did not abuse its discretion in fixing the amount of punitive damages. *See id.; Carpenter*, 853 S.W.2d at 365.

Based on its analysis of Brown's reliance on Jacobs's verbal representations, the district court also concluded the punitive damage issue should not have been submitted to the jury. 792 F.Supp. at 1537. Again wrongly rejecting Brown's reliance on verbal representations inconsistent with the written terms of the distributorship agreement, *see ante* at 1264, the district court held a reasonable person viewing the evidence could not find Jacobs acted with reckless disregard. *Id.* Construed in the light most favorable to Brown, however, the evidence supports the jury's punitive damage award. Brown's claim for fraudulent misrepresentation was properly submitted to the jury, and the jury reasonably could find Jacobs acted in reckless disregard of Brown's rights.

The district court also held the amount of the punitive damage award was so unrealistic that it showed irrational

rather than reasonable jury behavior. *Id.* Considering Jacobs's net worth of over $51 million, Brown's actual damages of nearly $2.5 million, and the continuous nature and magnitude of Jacob's deceit, however, the $2.7 million punitive damage award is not so excessive or unreasonable that it shocks our constitutional sensibilities or could only have resulted from irrational jury behavior. *See TXO Prod. Corp. v. Alliance Resources Corp.*, ——— U.S. ———, ———-———, 113 S.Ct. 2711, 2722-23, 125 L.Ed.2d 366 (1993) (affirming $10 million punitive damage award when actual damages were $19,000).

V.

Brown also contends the district court should not have granted Jacobs's JAML motion on Jacobs's claim for the unpaid account balance because Brown's equitable estoppel defense should have been submitted to the jury. We disagree. Because Brown failed to plead the affirmative defense of estoppel, Brown waived it. *Ronollo v. Jacobs,* 775 S.W.2d 121, 124 (Mo.1989) (en banc). The district court thus properly granted Jacobs's JAML motion on Jacobs's claim.

VI.

Having decided the district court erroneously granted JAML on the liability issue, we must also consider the district court's conditional grant of a new trial. 792 F.Supp. at 1539-40. The district court held Jacobs is entitled to a new trial on the third representation because the verdicts of fraud and negligence were inconsistent. *Id.* We agree with Brown that Jacobs waived the right to a new trial based on inconsistent verdicts, and failed to preserve the issue for our review, when Jacobs failed to object and move for resubmission before the jury's discharge. *Brode v. Cohn,* 966 F.2d 1237, 1239 (8th Cir. 1992). In any event, because the first and second representations were properly submitted to the jury on the fraud theory alone and these representations support the

jury's awards of compensatory and punitive damages, any inconsistency with respect to the third representation was harmless error.

The district court also granted a new trial on the ground the punitive damages award was not supported by "substantial evidence." 792 F.Supp. at 1539. Although this is an imprecise statement of the evidentiary standard for granting a new trial, the district court also correctly stated it could disturb the jury's verdict only if the verdict was against the "great weight" of the evidence, so that granting a new trial would prevent a miscarriage of justice. *Id.; see White v. Pence,* 961 F.2d 776, 780-81 (8th Cir. 1992). Instead of explaining reasons for concluding a new trial should be granted on the weight of the evidence, *Pence,* 961 F.2d at 781-82, however, the district court merely stated, "For all of the reasons previously discussed, there was not substantial evidence supporting the award of punitive damages," 792 F.Supp. at 1539.

Because the "previously discussed" reasons could only refer to the district court's analysis of the evidentiary basis for the punitive damages award when considering Jacob's motion for JAML, *see id.* at 1536-37, it is less than clear that the district court applied the new trial standard rather than the JAML standard in granting Jacobs a new trial. If the district court applied the JAML standard, the court could not grant a new trial because "[JAML] principles have no application to the consideration of a motion for new trial on the ground that the verdict is against the weight of the evidence." *Pence,* 961 F.2d at 779. Regardless of whether the district court considered its earlier analysis of the evidence under the JAML standard or the new trial standard, however, the evidentiary analysis was infected by the district court's legally incorrect view that Brown could not justifiably believe Jacob's verbal representations over the written agreement's terms, *see* 792 F.Supp. at 1537, as we have already pointed out, *ante* at 1264, 1265-66. Further, if the dis-

trict court used the new trial standard, the court misapplied it. The district court did not properly weigh Brown's testimony about Jacob's verbal representations, find Brown's testimony unworthy of belief, or find a significant weight factor favoring Jacobs. *See Pence,* 961 F.2d at 781. Rather, because Brown's testimony was at odds with the written agreements, the district court concluded that "a reasonable jury could not fairly conclude [Jacobs's] conduct was either outrageous or . . . reckless." 792 F. Supp. at 1537. Putting the district court's misconception of Missouri law aside, this case simply involves diametrically opposed credible evidence, and it is the jury's function to choose between plausible versions of the evidence. *Pence,* 961 F.2d at 781. *Pence* makes clear that when, as in this case, reasonable persons can differ in evaluating credible evidence and the district court has not diminished the credible evidence by finding witnesses unworthy of belief or otherwise properly rejecting some of the testimony, a new trial on the ground of weight of the evidence should not be granted. *Id.* The district court could not properly grant a new trial in this case. We thus need not remand, but simply reverse the district court's conditional grant of a new trial. *See id.*

Brown also contends the district court committed error in considering the jury's responses to special interrogatories that the district court submitted after the jury returned unambiguous verdicts. *See* 792 F.Supp. at 1540. We agree. Special interrogatories are inappropriate after the jury has returned an unambiguous verdict because "there is no reason to ask the same question a second time in a different form" or to question the jury's reasoning. *Neufeld v. Searle Labs.,* 884 F.2d 335, 338 n. 1 (8th Cir.1989). Postverdict interrogatories may imply the jury's verdict is unjustified and cause the jury to answer the interrogatories in a manner inconsistent with the verdict. Thus, the district court should not have considered the jury's answers to postverdict interrogatories in deciding whether to grant a new trial. At any rate, the district

court recognized the postverdict interrogatory answers alone would not warrant a new trial.

VII.

Accordingly, we affirm the district court's grant of JAML on Jacobs's claim and reverse the district court's grant of JAML or a new trial on Brown's fraudulent misrepresentation counterclaim. We remand to the district court with instructions to enter judgment in favor of Brown in accordance with the jury's verdict on Brown's fraudulent misrepresentation counterclaim.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 84-0887-CV-W-9

THE JACOBS MANUFACTURING COMPANY,
Plaintiff,

v.

SAM BROWN COMPANY,

v.

CHICAGO PNEUMATIC TOOL COMPANY,
THOMAS LATIMER AND DONALD B. SANDSTROM,
Defendants.

Jan. 8, 1992

AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND GRANTING, IN THE ALTERNATIVE, PLAINTIFF'S MOTION FOR A NEW TRIAL ON DEFENDANT'S COUNTERCLAIM FOR FRAUD AND NEGLIGENT MISREPRESENTATION

BARTLETT, District Judge.

Background

Beginning on August 20, 1990, evidence was presented to the jury on plaintiff Jacobs Manufacturing Company's claim for an unpaid account and on defendant Sam Brown Company's counterclaims for fraud and negligent misrepresentation. After a directed verdict was entered on plaintiff's claim, the jury returned verdicts for actual and punitive damages in favor of Brown on its counterclaims. Thereafter, Jacobs requested that the jury's verdicts be set aside and that judgment be rendered in its favor in accordance with its Motions for Directed Verdict. In addition, Jacobs moved for judgment notwithstanding the verdict pursuant to Rule 50(b), Federal Rules of Civil Procedure, and for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure.

For the reasons stated in this opinion, Jacobs' Motions for a Directed Verdict and for Judgment Notwithstanding the Verdict will be granted. In the alternative, Jacobs' Motion for New Trial will be granted.

I. MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

A. *Standard of Review*

The standard for a directed verdict is the same as the standard for judgment notwithstanding the verdict. *City of Omaha Employees Betterment Ass'n v. City of Omaha,* 883 F.2d 650, 651 (8th Cir. 1989).

Judgment may be entered in favor of the moving party if there is but one reasonable conclusion about the proper result. *Compton v. United States,* 377 F.2d 408, 411 (8th Cir.1967). Motions for directed verdict and for judgment notwithstanding the verdict challenge the sufficiency of the evidence to support the jury's verdict. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940). In deciding whether to grant a motion for directed verdict or for judgment notwithstanding the verdict, I must consider the evidence in the light

most favorable to the non-moving party, assume that all conflicts in the evidence were resolved by the jury in favor of the non-moving party, assume, as proved, all facts which the non-moving party's evidence tends to prove and give the non-moving party the benefit of all reasonable inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962); *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir.1977). The court may not consider the credibility of the witnesses or the weight of the evidence. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1105 (8th Cir. 1981). A motion for directed verdict or for judgment notwithstanding the verdict should be granted only if the evidence, together with all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, would not allow a reasonable jury to find in favor of the non-moving party. *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1195-96 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080, 103 S.Ct. 1767, 76 L.Ed.2d 342 (1983).

B. *Fraudulent Misrepresentation Claim*

Brown contends that Jacobs made three misrepresentations: 1) that Jacobs was not *considering any plans* to change its existing method of distributing the Jake Brake; 2) that Jacobs *had no plans* to change its existing method of distributing the Jake Brake; and 3) that if Brown continued to be a Jake Braket distributor during bad economic times, its distributorship would continue during good economic times.

Jacobs argues that these representations were never made. In the alternative, Jacobs argues that if they were made, they are not actionable because they were not false when made and representations of future intent must be false when made in order to be actionable.[1]

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[1] In its Suggestions in Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict, Brown, relying on *California &*

1. Elements of Claim for Fraudulent Misrepresentation

In order to prevail on its claim for fraudulent misrepresentation, Brown was required to establish: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of the falsity or ignorance of truth; 5) plaintiff's intent that the representation be acted upon; 6) defendant's ignorance of the falsity of the representation; 7) defendant's reliance on the truth of the representation; 8) defendant's right to rely on the representation; and 9) defendant's consequent and proximate injury. *Clark v. Olson,* 726 S.W.2d 718, 719 (Mo. banc 1987). Failure to establish any single element is fatal to the entire claim. *Powers v. Shore,* 248 S.W.2d 1, 5 (Mo. banc 1952). Fraud may never be presumed; therefore, fraud cannot be proved by facts and circumstances which are equally consistent with honesty and good faith. *Macon-Atlanta State Bank v. Gall,* 666 S.W.2d 934, 941 (Mo.App.1984).

To establish fraud where a statement of future intent is involved, it must be shown that the speaker at the time of the utterance actually intended to peform inconsistently with his words. *Dillard v. Earnhart,* 457 S.W.2d 666, 670 (Mo. banc 1970); *Craft v. Metromedia, Inc.,* 766 F.2d 1205, 1219 (8th Cir.1985), *cert. denied,* 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986). Absent a present intent to perform inconsistently with the representation, there is no misrepresentation of fact or of state of mind but only breach of a promise or failure to perform. *Craft,* 766 F.2d at 1219. Mere failure to perform is insufficient to establish fraud. *Brennaman v. Andes & Robert Bros. Const. Co.,* 506 S.W.2d 462, 465 (Mo.App.1973).

Hawaiian Sugar Co. v. Kansas City Terminal Warehouse Co., Inc., 602 F.Supp. 183 (W.D.Mo.1985); *aff'd,* 788 F.2d 1331 (8th Cir. 1986), attempts to support the jury's verdict by arguing that this case involves plaintiff's fraudulent failure to disclose that it was considering plans to change its method of distribution. Fraudulent concealment, however, was not a theory of liability asserted by Brown and was not submitted to the jury.

2. None of the Representations Should Have Been Submitted to the Jury

The first two representations relied upon by Brown as the basis for its fraudulent misrepresentation claim are: 1) Jacobs represented that it was not considering any plans to change its existing method of distributing the Jake Brake, and 2) after July 1981, Jacobs represented that it had no plans to change its existing method of distributing the Jake Brake. Both of these representations are of present fact, not future intent.

With regard to the first representation, there was evidence, including reasonable inferences from the evidence, from which the jury could have concluded reasonably that 1) Jacobs represented it was not considering any plans to change its existing method of distributing the Jake Brake; and 2) Jacobs *was considering* plans to change its existing method of distributing the Jake Brake at the time the representations were made.

With regard to the second representation, there was no evidence from which the jury could reasonably conclude that Jacobs actually had plans to change its method of distributing the Jake Brake when it represented that it had no plans to change its method of distributing the Jake Brake. The evidence that Jacobs was *considering* changing its method of distribution would not permit a reasonable jury to conclude that Jacobs had, therefore, *decided* to change its method of distribution. Brown failed to present evidence from which a reasonable jury could conclude that the second representation was false. Therefore, the second representation should not have been submitted to the jury.

The third representation relied upon by Brown is that after July 1981, Jacobs represented that if Brown continued to be a Jake Brake distributor during bad economic times, its distributorship would continue during good economic times.

This is a representation of future intent. There was no evidence presented by Brown from which a reasonable jury could conclude that when this representation were made, Jacobs intended to terminate Brown's distributorship of the Jake Brake when good economic times arrived.

Brown argues that there were several studies done by Jacobs over the years that showed a present intent to terminate the distributorship when the economy improved. Although Brown is correct that these studies recommend the termination of the distributors, there was no evidence from which a reasonable jury could conclude that these recommendations were ever adopted by Jacobs. In fact, Jacobs never eliminated distributors.

Accordingly, the second and third representations should not have been submitted to the jury in Instruction 12, the verdict-directing instruction submitting plaintiff's fraudulent misrepresentation claim. Because the representations were submitted in the disjunctive and the jury believed that Jacobs made the first representation, *see* the jury's response to the special interrogatory designated Instruction 19, the analysis must continue.

Having concluded that there was evidence from which a reasonable jury could conclude that the first representation was made and that it was false, there must have been evidence from which a reasonable jury could have concluded that Brown actually relied on this misrepresentation. *Country Shindig Opry, Inc. v. Cessna Aircraft Co.*, 780 F.2d 1408, 1411-12 (8th Cir.1986). Also, there must be evidence from which a reasonable jury could conclude that Brown had a right to rely on this representation. *Hanson v. Acceptance Finance Co.*, 270 S.W.2d 143, 149 (Mo.App. 1954). (If at some later time it were concluded that there was evidence from which a reasonable jury could have found that either the second or third representations were made and were false, the following discussion of reliance would be applicable to those representations.)

Brown's president had a degree in economics and was an experienced businessman. He had participated in many contract negotiations, distributed products for at least 100 different manufacturers over the years and had the services of an experienced attorney readily available. For eight successive years, Brown's president signed distributorship agreements providing that 1) the term of the agreement was one year and was terminable without cause on 30 days notice, 2) Jacobs reserved the right to sell directly to any original equipment manufacturer, 3) the written agreement was the sole agreement between the parties and 4) no amendment to that agreement was binding unless agreed to in writing.

Bernard Brown testified that the provisions of the agreement concerning its duration and Jacobs' reservation of the right to sell directly to original equipment manufacturers were merely boilerplate. Brown's constant repetition of "boiler-plate" when combined with a disdainful tone of voice, communicated to the jury that the words in the agreement were meaningless. In fact, these were provisions that Brown, as president of the defendant, agreed to and that Jacobs and defendant Brown intended to govern their relationship. If Brown treated them as cavalierly as he suggested to the jury that it should and if he relied on inferences drawn from various events that were in direct conflict to written provisions of the contract, he must bear the consequences of his ill-advised behavior.

No facts were presented that would, as a matter of law, justify Brown's reliance on oral statements or inferences from oral statements directly conflicting with the clear, written terms of the agreement with Jacobs. Brown never consulted with his attorney about the legal effect of the written agreements. According to his testimony, he invested hundreds of thousands of dollars and incurred large losses based on his assumption that oral statements by various people at Jacobs carried more weight than the

written agreements. If Brown remained a Jacobs distributor because of oral representations that Brown had a future as a Jacobs distributor, under the same conditions as in the past, while at the same time signing written distributorship agreements that conflicted with these oral satements, Brown must bear the consequences. The law will not protect Brown from his own carelessness.

Furthermore, there was unchallenged evidence that Brown knew Jacobs was considering changes in its method of distribution but that Brown went ahead and signed another agreement. On July 28, 1982, Bernard Brown, president of Sam Brown Company, wrote Jacobs demanding "a statement from Jacobs indicating what their position would be and if, in fact, the distributor will continue to be a part of the marketing policy of Jacobs or that OEMs and large fleets will be shipped direct from Hartford as is the apparent indication at this point." Defendant's Exhibit 8267. Jacobs responded, "Future market conditions and demands may require a change in the manner in which Jacobs satisfies the requirements of superfleets and vehicle and engine OEMs." Plaintiffs Exhibit 12. Brown responded by saying in part, "It seems to me that Jacobs' management has apparently set in motion a far-reaching plan to change your method of distribution which will affect your independent distributors such as ourselves. . . . Since you have unilaterally reevaluated your policies, we will have to do the same." Defendant's Exhibit 8269. After this exchange of correspondence, Brown entered into a distribution contract with Jacobs on essentially the same terms as in previous years. Plaintiff's Exhibit 211. There was no evidence that Jacobs made some misrepresentation in the four months between the correspondence quoted above and the signing of the next agreement that induced Brown to sign a new agreement.

Accordingly, a reasonable jury could not have determined that Brown was justified in relying on representa-

tions that Jacobs was not considering changing its method of distribution.

These conclusions are fatal to Brown's claim of fraudulent misrepresentation. The claim never should have been submitted to the jury. Therefore, Jacobs' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict will be granted on Jacob's fraudulent misrepresentation claim.

C. *Negligent Misrepresentation Claim*

The jury found that Jacobs negligently represented "from and after July 1981, that if Sam Brown Company continued to be a 'Jake Brake' distributor during bad economic times, its 'Jake Brake' distributorship would continue during good economic times." *See* jury's response to special interrogatory designated Instruction 20.

1. Elements of Claim for Negligent Misrepresentation

The elements of a negligent misrepresentation claim are that: 1) the defendant supplied information in the course of its business or because of some other pecuniary interest; 2) because of a failure by defendant to exercise reasonable care or competence, the information was false; 3) the information was intentionally provided by defendant for the guidance of a limited group, including plaintiff, in a particular business transaction; and 4) in relying on the information, plaintiff suffered a pecuniary loss. *Frame v. Boatmen's Bank*, 782 S.W.2d 117, 121 (Mo. App.1989); *Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 766, 783-784 (Mo.App.1983). Liability for negligent misrepresentation has been limited to situations where 1) the defendant has knowledge of the specific injured party's reliance; or 2) the plaintiff is a member of a group that the defendant seeks to influence; or 3) the defendant has special reason to know that some member of a limited group

will rely on the information. *Chubb*, 656 S.W.2d at 784; *Mark Twain Plaza Bank v. Lowell H. Listrom & Co.*, 714 S.W.2d 859, 865 (Mo.App.1986).

2. The Third Representation Should Not Have Been Submitted to the Jury

Whereas fraudulent misrepresentation requires proof that the speaker *knew* the statement was untrue or was *reckless* as to whether the statement was true or false, negligent misrepresentation "merely requires proof that the [speaker] failed to exercise reasonable care or competence to obtain or communicate true information." *Huttegger v. Davis*, 599 S.W.2d 506, 516 (Mo. banc 1980) (Welliver, J., dissenting). A negligent misrepresentation claim is premised upon the theory that the speaker believed that the information supplied was correct, but was negligent in so believing. The typical action for negligent misrepresentation thus involves a representation of an *existing fact, not* a representation of *future intent*. While it is possible to be negligent in failing to ascertain the truth or falsity of an existing fact, it is impossible to be negligent in failing to ascertain the truth or falsity of one's own future intentions. One cannot negligently represent his or her own state of mind. *See Restatement (Second) of Torts* § 530 cmt. b (1977). Even if one states an intent to act in a certain manner and is merely *uncertain* if one intends to act in that manner, the statement is not negligent but deceitful because one *knows* about the uncertainty of one's future intent.

Consequently, no cause of action exists for negligent misrepresentation of the promisor's intention to perform an agreement. *City of Warrensburg, Mo. v. RCA Corp.*, 571 F.Supp. 743 (W.D.Mo.1983).

Here, the representation the jury believed was negligently made is a statement about Jacobs' intent to perform in a certain way in the future. Because no cause of action exists for negligent representation of future intent, it was error to submit this representation to the jury.

If this were not a representation of future intent, there would have to have been evidence from which a reasonable jury could conclude that Brown actually relied on the misrepresentation. *Chubb*, 656 S.W.2d at 783-784. For the reasons discussed in the analysis of Brown's fraudulent misrepresentation claim, a reasonable jury could not have concluded that Brown relied on the representation or, if it did, that Brown used ordinary care in so doing.

Accordingly, Jacobs' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict on Brown's negligent misrepresentation claim will be granted.

D. *Jury Award for Lost Future Profits Should be Vacated*

The jury awarded Brown $2,220,637 in lost future profits for the five-year period beginning in 1984. Jacobs asserts four reasons to vacate this award: 1) loss of future profits is not a proper measure of damages for fraudulent or negligent representation, 2) the evidence of lost future profits was speculative, 3) any loss of future profits was not the proximate result of any of the claimed fraudulent or negligent representations, and 4) Brown waived any claim for lost future profits.

1. Loss of Future Profits is a Proper Measure of Damages

Jacobs contends that the traditional "benefit of the bargain" measure of damages is not applicable where the claim is fraudulent inducement to continue a distributorship agreement. According to Jacobs, damages are correctly measured by the net *losses* the distributor can prove were sustained as a result of and during the continuation of the distributorship, not by lost future profits.

Brown agrees that the traditional "benefit of the bargain" measure does not apply to this case but disputes

Jacobs' contention that lost future profits are unrecoverable.

The general rule is that prospective profits are recoverable when an established business is interrupted by tortious conduct if it is proved that 1) it is reasonably certain that profits would have been realized except for the tort and 2) the lost profits can be ascertained and measured, from the evidence introduced, with reasonable certainty. *Riddle v. Dean Machinery Co.*, 564 S.W.2d 238, 257 (Mo.App.1978), citing 22 Am.Jur.2d, Damages § 177 (presently § 639 (1988)).

Jacobs' reliance on *Central Microfilm Service Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1220-1221 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1191, 75 L.Ed.2d 436 (1983), as authority to the contrary is mistaken. There, the defendant was sued for fraudulently inducing the plaintiff to continue as a software dealer for defendant. Jacobs relies on the following language:

> As to fraud in a transaction, the typical "bargain theory" measure is the difference between the actual value and the represented value of the subject of the transaction. *See Smith v. Tracy, supra*, 372 S.W.2d [925] at 938. Such a measure simply makes no sense in this case, given the nature of the fraud. [Defendant] did not make representations as to specific values or as to particular facts directly relating to such values. It fraudulently induced [plaintiff] to continue as a dealer and the harm from such continuation is best measured by the net losses incurred as result [sic] of it.

Central Microfilm, 688 F.2d at 1220-1221.

Although it is true that the nature of the fraud here is the same as in *Central Microfilm*, I do not believe that the last-quoted sentence was intended to preclude recovery of lost future profits in all cases. In *Central Microfilm*, the plaintiff "introduced no evidence of future

profits and sought no recovery on such a basis." *Id.* at 1220. The plaintiff actually pursued a 'reliance or out-of-pocket loss theory." *Id.* Thus, the court's statement that "the harm from such continuation is best measured by the net losses incurred as result of it" must be read simply as an acknowledgment that, of the two theories presented to it, the out-of-pocket loss theory was the more appropriate because 1) it was the theory actually pursued, and 2) the traditional method of computing the "benefit of the bargain" did not fit the facts. The court did not discuss whether an alternative method of computing the "benefit of the bargain," *e.g.*, lost profits, would fit the facts because the issue was not raised.

2. Evidence of Lost Future Profits Was Not Speculative

Jacobs contends that the evidence of lost future profits was speculative, and, therefore, there was no evidentiary basis for the award of lost future profits.

Generally, recovery of anticipated profits of a commercial business is not allowed because the existence and amount of lost future profits is too remote, speculative and dependent upon changing circumstances. *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. banc 1968); *Mills v. Murray*, 472 S.W.2d 6, 16-17 (Mo.App.1971). Nevertheless, anticipated profits may be recovered when they are made reasonably certain by proof of facts permitting a rational estimate of their amount. *Coonis*, 429 S.W.2d at 714; *Gasser v. John Knox Village*, 761 S.W.2d 728, 731-732 (Mo.App.1988). Although the estimate of loss may not be based on speculation or conjecture, *John Knox Village*, 761 S.W.2d at 732, a wrongdoer will not be allowed to escape liability because the amount of resulting loss is not susceptible of exact proof. *Denton Const. Co. v. Missouri State Highway Commission*, 454 S.W.2d 44, 56 (Mo. banc 1970); *Scullin Steel Co., v. PACCAR, Inc.*, 708 S.W.2d 756, 761 (Mo.App.1986).

Jacobs argues that Brown's future profit claim was based on Dr. Pflaum's speculation that there was a correlation between Brown's sale of Jake Brakes and the sale of Class 7 and 8 trucks in the United States. Although the basis for Pflaum's correlation theory was vigorously attacked on cross-examination, the jury was properly left to determine whether they believed Dr. Pflaum's conclusion after plaintiff's challenge to the basis for it. A reasonable jury could conclude that there was a correlation between the defendant's sales of Jake Brakes and the sales of large trucks.

Similarly, other parts of defendant's lost profits analysis were attacked on cross-examination. Plaintiff's counsel developed good material to use in arguing that defendant's conclusions about lost profits were not persuasive. The jury was properly allowed to weigh the evidence.

3. Loss of Future Profits Was Not Directly Caused by Any Misrepresentation

Jacobs argues that Brown failed to prove that the loss of future profits was proximately caused by any of the alleged fraudulent or negligent misrepresentations because Brown was offered a distribution agreement for 1984 but declined to sign it.

To be recoverable under either a fraud or negligence theory, lost future profits damages must be shown to be a direct consequence of the misrepresentation. The misrepresentation must be the proximate and not the remote cause of the damages. *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443-444 (Mo. banc 1988); *see Quality Wig Co. v. J.C. Nichols Co.*, 728 S.W.2d 611, 618 (Mo.App. 1987).

In light of the previous analysis, Jacobs' argument can be rephrased as follows: Brown failed to present evidence from which a reasonable jury could conclude that Brown suffered a loss of future profits as a direct result of Jacobs'

representation that it was not considering changing its method of distributing the Jake Brake.

Whether there was proximate cause is a jury question so long as there is evidence from which a reasonable jury could find proximate cause. I do not believe that a reasonable jury could have concluded that the "not considering" misrepresentation directly caused a loss of future profits because 1) Brown knew that Jacobs was considering changing its method of distribution as early as July 28, 1982, 2) Brown knew that each of the written agreements Brown signed allowed Jacobs to sell directly to OEMs, 3) direct sales to OEMs was one of Brown's biggest problems with the changes Jacobs implemented and 4) Brown was so vague about why he did not agree to the 1984 distributorship agreement that was offered to him.

4. Brown Did Not Waive Claim for Lost Future Profits

The following waiver clause appears in all eight distributorship agreements signed by Brown:

> Upon termination, no indemnity shall be payable to the Distributor for loss of profits, good will, and the like, or for advertising costs, termination of employees, employees' salaries and the like, and the Distributor hereby expressly waives any rights he may have under law to receive such indemnity.

See, e.g., Tab 5, Plaintiff's Appendix to Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial.

Jacobs contends that by suing for damages, Brown has elected to affirm the contract and, accordingly, must be bound by the waiver-of-damages clause in that contract.

Upon discovery of a fraud, the defrauded party has a choice of remedies. The contract may be rescinded and recovery had for what was paid or the contract may be affirmed and recovery had for the damages caused by the

fraud. The defrauded party cannot pursue to a final conclusion both a claim for rescission and a claim for damages. The defrauded party cannot both affirm and disaffirm the contract. *Centerre Bank of Kansas City, N.A. v. Distributors, Inc.*, 705 S.W.2d 42, 51 (Mo.App.1985); 25 Am.Jur.2d, Election of Remedies, § 27 (1966).

Thus, Jacobs is correct that by suing for damages for fraud, Brown has affirmed the contract. Brown's argument to the contrary misconstrues the authority it cites. Brown relies primarily upon *Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 290 (8th Cir.1990):

> Under Missouri law, a party who is the victim of fraud in the inducement of a contract may choose among three avenues of relief. The party may: (1) rescind the contract and seek restoration of the status quo; (2) affirm the contract and pursue whatever contractual remedies may be available; or (3) bring an action seeking damages for the asserted fraud.

Brown argues that seeking damages for fraud—the third option listed in *Western Fireproofing*—requires neither an affirmance nor a disaffirmance of the contract. Thus, Brown asserts that it did not affirm the contract by seeking damages for fraud. Therefore, the waiver of damages clause in the contract does not apply.

The Supreme Court of Missouri disagrees:

> By bringing an action for damages for fraud, the defrauded party elects to treat the contract as subsisting, and, in effect, affirms it, thereby consenting to be bound by its provisions, without releasing or waiving his claim for damages arising from the fraud.

Johnson v. Bray, 31 S.W.2d 998, 1001 (Mo. banc 1930).

The third option in *Western Fireproofing* should be: "(3) *affirm the contract and* bring an action seeking damages for the asserted fraud." Option three is distinguish-

able from option two by the *form of remedy*. Options two and three both affirm the contract, but option two involves a *contract* remedy, whereas option three involves a *tort* remedy.

Thus, Brown affirmed the contract by electing to seek damages for fraud.

Jacobs correctly asserts that a damage waiver provision generally is not against public policy is Missouri, *see* Mo. Rev.Stat. § 400.2-719(3). However, the issue is not whether such a clause generally is enforceable in an action based on contract, but whether it is enforceable in an action based on fraud. "It is well settled, of course, that the law will not sustain a covenant of immunity which protects against fraud, contravenes public policy, is prejudicial to the public welfare, is contrary to good morals, or relieves one of a duty imposed by law for the public benefit." *United States v. United States Cartridge Co.*, 198 F.2d 456, 464 (8th Cir.1952), *cert. denied*, 345 U.S. 910, 73 S.Ct. 645, 97 L.Ed. 1345 (1953). A party to a contract cannot, by misrepresentation of a material fact, induce the other party to enter into the contract to his damage, and then protect himself from the legal effect of such misrepresentation by inserting a clause in the contract to the effect that he is not to be held liable for the misrepresentation. *See Beshears v. S-H-S Motor Sales Corp.*, 433 S.W.2d 66 (Mo.App.1968); *Slater v. KFC Corp.*, 621 F.2d 932, 936 (8th Cir.1980).

Assuming that Jacobs had presented evidence from which a reasonable jury could have concluded that the elements of a claim for fraudulent misrepresentation had been established, the contractual waiver provision relied upon by Jacobs would not prevent recovery of lost future profits.

E. *Brown Did Not Waive Claim for Southern Region Losses*

In addition to the future profits for the years 1984 through 1988, the jury awarded Brown $271,155.35 in

out-of-pocket losses for the southern region. Jacobs contends that Brown waived its claim to these losses 1) during Brown's opening statement and 2) during a discussion of an evidentiary objection at the bench.

Brown maintains that it waived only "capital expense and investment losses in the Southern Region, *not* out-of-pocket losses." Further, Brown contends that even if it waived out-of-pocket losses for the Southern Region in the manner asserted by Jacobs, Jacobs subsequently waived the waiver by not objecting to Brown's request in Brown's closing argument for out-of-pocket losses for the Southern Region.

Generally, admissions of fact made by counsel are binding upon their principals so long as they are unequivocal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3rd Cir.1972); *Wieder v. Towmotor Corp.*, 568 F.Supp. 1058, 1063 (E.D.Pa.1983), *aff'd* 734 F.2d 9 (3rd Cir. 1984). Where, however, a doubt exists as to the purported admission, the issue may not be removed from the jury's consideration. *Id.; Rhoades, Inc. v. United Air Lines, Inc.*, 340 F.2d 481, 484 (3rd Cir.1965).

I agree that Brown's counsel waived a claim for Southern Region losses in his opening statement and during the bench conference relied upon by Jacobs. (I allowed the testimony about the investment in the Southern Region only as an aide to the jury in making a determination about lost future profits.) However, the clarity of that waiver was destroyed by later events during the trial, i.e., Bernard Brown's testimony quoted by defendant in Doc. 238 at 39-40, Group Exhibit E, the stipulation as to Group Exhibit E and defendant's closing argument. Therefore, I believe that the issue of Southern Region losses was properly left to the jury.

F. *Jury Award For Punitive Damages Should Be Vacated*

The jury awarded Brown $2,700,000 in punitive damages. Jacobs argues that the award (1) violates due

process, (2) was not supported by sufficient evidence, and (3) violates equal protection.

1. Due Process

Jacobs asserts that Missouri law on punitive damages violates procedural due process because Missouri law (a) is unconstitutionally vague as to the type of conduct that renders one liable to punitive damages, (b) provides no meaningful guidelines for or limitations on the fact finder in determining the amount of punitive damages, and (c) requires the wrong standard of proof.

a. *Missouri Standard Defining Conduct Subject To Punitive Damages Is Not Unconstitutionally Vague*

Jacobs contends that Missouri law is unconstitutionally vague in describing the type of conduct that exposes one to punitive damages liability. According to Jacobs, Missouri requires a "willful, wanton or malicious culpable mental state" in order to award punitive damages. Jacobs contends, however, that the Missouri Supreme Court has not defined the specific conduct which violates this standard or otherwise given guidance to a jury about what conduct would support an award of punitive damages. Jacobs contends that the "overwhelming uncertainty" about what conduct satisfies the Missouri standard makes the Missouri standard unconstitutionally vague.

In *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc. 1989), the Missouri Supreme Court discussed at length the purpose of punitive damages and the level of malice required to support an award of punitive damages:

> Justified as punishment and intended to make an example of a defendant on account of his outrageous conduct, punitive damages require a showing of a culpable mental state on the part of the defendant, either by a wanton, willful or outrageous act or reckless disregard (from which evil motive is inferred)

> for an act's consequences. 'Punitive damages may be awarded for conduct that is outrageous, becasue of the defendant's evil motive or reckless indifference to the rights of others.' [Citation omitted.] It is not so much the commission of the intentional tort as the conduct or motives—the defendant's state of mind—which prompted its commission that form the basis for a punitive damage award. . . . Plaintiff must prove the defendant's evil hand was guided by an evil mind.

The court set forth the form and content of a proper punitive damages jury instruction "in language readily understood by lawyers and lay people alike," *id.* at 789, so that a jury of lay people could properly determine "conduct for which punitive damages are appropriate." *Id.*[2]

In *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972), the United States Supreme Court stated that:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary

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[2] "Henceforth, MAI 10.01 should read:

> If you find the issues in favor of plaintiff, and if you believe the conduct of the defendant as submitted in Instruction Number —— (here insert number of plaintiff's verdict directing instruction) was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number ——, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter him and others from like conduct."

Burnett, 769 S.W.2d at 789.

> and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

To succeed on a claim of vagueness in violation of due process, the complainant "must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

Jacobs argues that the standard for imposing punitive damages does not afford sufficient notice of the types of conduct that may subject the defendant to punitive damages. This argument addresses a different issue than that addressed in *Grayned*. There, the issue was reasonable notice of prohibited conduct. Vague laws offend because they do not allow us to "steer between lawful and unlawful *conduct*." Here, Jacobs is not arguing that the law gives insufficient notice of prohibited conduct. Jacobs is not arguing, for example, that the law does not sufficiently inform it that fraudulent conduct is prohibited. Jacobs is actually arguing that the law gives insufficient notice of the precise *punishment* for conduct that Jacobs knew was prohibited.[3] Jacobs' argument raises the question of whether the vagueness doctrine applies to punishment.

Vague sentencing provisions may present constitutional questions if they do not state with sufficient clarity the punishment for violating a *criminal* statute. *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979). I am cited to no authority, and

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[3] Jacobs' "void for vagueness" argument is also unusual in that the vagueness doctrine generally applies to *statutes*, not to *caselaw*. Jacobs is complaining here that court-created standards for punitive damages are unduly vague.

my own research has revealed no authority, that applies the vagueness doctrine to the standard for civil *punishment*. Because punitive damages are penal in nature, however, it will be assumed for the purposes of this analysis that the vagueness doctrine applies to the standard for awarding punitive damages.

Under *Grayned*, it is necessary to determine whether the law gives reasonable notice of prohibited behavior to potential wrongdoers and provides explicit standards to those who apply the law. The Supreme Court has stated that "a scienter requirement may mitigate at law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Flipside*, 455 U.S. at 498, 102 S.Ct. at 1193.

The jury instruction adopted by the Missouri Supreme Court in *Burnett* requires that there be some element of outrage to justify punitive damages, that conduct is "outrageous" because of "evil motive or reckless indifference" and that the purpose of punitive damages is to punish and deter. As expressed in *Burnett*, Missouri's standard for the award of punitive damages provides a sufficient scienter requirement to give guidance to potential wrongdoers and to juries as to what conduct supports an award of punitive damages. The Missouri punitive damages standard is not unconstitutionally vague.

b. *Instruction 15 Did Not Inform the Jury of Missouri's Standards for Determining the Amount of Punitive Damages*

Jacobs next asserts that (i) because there are no standards for the jury to apply in setting the *amount* of a punitive damages award, and (ii) because there is no upper limit on the *amount* of punitive damages that may be awarded, the determination of the amount of punitive damages awarded is committed solely to the unfettered discretion of the jury.

In Missouri, the jury has great discretion in fixing the amount of punitive damages:

> The question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury. In exercising such discretion and arriving at its conclusions, the jury must, of necessity, consider all of the facts and circumstances surrounding the incident and the party to the cause.

Wisner v. S.S. Kresge Co., 465 S.W.2d 666, 669 (Mo. App.1971). "[A] hard and fast rule for the measuring of [punitive] damages cannot be declared." *Wheeler v. Community Federal Sav. and Loan Assoc.*, 702 S.W.2d 83, 87 (Mo.App.1985) (quoting *Sperry v. Hurd*, 267 Mo. 628, 185 S.W. 170, 174 (1916).

Punitive damages are awarded in Missouri for the purpose of punishing the wrongdoing defendant and also for the purpose of deterring defendant and others from similar wrongful conduct in the future. *State ex rel. Smith v. Greene*, 494 S.W.2d 55 (Mo. banc 1973); *Boyer v. Grandview Manor Care Center, Inc.*, 759 S.W.2d 230 (Mo.App.1988). In addition, punitive damages must have some reasonable relation to the injury inflicted and the cause thereof. *State ex rel. St. Joseph Belt R. Co. v. Shain*, 341 Mo. 733, 108 S.W.2d 351, 356 (1937); *Wheeler*, 702 S.W.2d at 88; *Holcroft v. Missouri-Kansas-Texas R. Co.*, 607 S.W.2d 158, 163 (Mo.App.1980).

In this case, Instruction 15 gave the jury the only guidance it had on what conduct would justify the imposition of punitive damages *and* how to determine the amount of punitive damages to award. Instruction 15 conforms to Missouri Approved Instruction 10.01, as revised by *Burnett*, 769 S.W.2d at 789.

> If you find in favor of Sam Brown Company on the fraudulent misrepresentation claim in Instruction 12 and if you believe the conduct of Jacobs Manufac-

> turing Company as submitted in Instruction 12 was outrageous because of Jacobs Manufacturing Company's evil motive or reckless indifference to the rights of Sam Brown Company, then in addition to any damages to which you find Sam Brown Company entitled under Instruction 14, you may award Sam Brown Company an additional amount as punitive damages to punish Jacobs Manufacturing Company and to deter Jacobs Manufacturing Company and others from like conduct. Please check the appropriate blank on Verdict A.
>
> If you unanimously agree that punitive damages should be awarded against Jacobs Manufacturing Company, there will be a further short proceeding in the courtroom before you deliberate on the amount of punitive damages.

On its face, Instruction 15 does not incorporate the Missouri requirement that the amount of punitive damages awarded must have a reasonable relation to the injury inflicted and the conduct that caused the injury. However, the Missouri Supreme Court approved this instruction presumably being fully aware of the Missouri decisions requiring a reasonable relationship between the amount of punitive damages awarded and the injury inflicted and the conduct that caused that injury. Because the Missouri Supreme Court did not overrule the decisions establishing the need for this relationship, I assume that the Missouri Supreme Court must have assumed that the need for this relationship was inherent in the concept of punishment. If that was the Missouri Supreme Court's thinking, it is far too obtuse for the average juror to appreciate. Without expressly stating the need for the relationship, a jury would not realize that any award of punitive damages must have a reasonable relationship to the harm caused and the conduct causing the harm.

If a "preponderance of the evidence" burden of proof is used for determining liability for punitive damages, due

process requires that during post-judgment review of punitive damage awards, consideration must be given to whether the amount of punitive damages awarded was reasonably related to the harm that was caused by the conduct being punished. (*See* discussion in next section of this opinion.) To make this post-judgment review both an effective constraint and consistent with a jury's role as factfinder, the jury must be told that it must consider this relationship in determining the amount of punitive damages. Otherwise, the jury's decision is being reviewed for conformity with a standard it never considered.

Under this analysis, Instruction 15 is fatally defective because it did not provide the jury with any guidance in how to determine the amount of punitive damages to be awarded.

c. *Because of the Defect in Instruction 15, the Instructions Did Not Provide a Sufficient Constraint on the Exercise of the Jury's Discretion*

Jacobs next argues that due process requires a heightened standard of proof for punitive damages and suggests that "clear and convincing" is the appropriate standard.

The Missouri Supreme Court has rejected this standard: "The defendant argues that punitive damages submissions should require 'clear and convincing' evidence. This requirement is contrary to our normal requirements in the submission of civil cases. We are not disposed so to hold, or to follow cases from other jurisdictions so holding." *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990).

In *Pacific Mut. Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the United States Supreme Court stated that "as long as the [punitive damages factfinder's] discretion is exercised within reasonable constraints, due process is satisfied." *Haslip*, 111 S.Ct. at 1044. The Court suggested that the absence of adequate procedural and substantive restraints on jury discretion

might require a burden of proof greater than "preponderance of the evidence." *Haslip,* 111 S.Ct. at 1046 n. 11.

In evaluating the procedure for awarding punitive damages in Alabama the Court noted two constraints that controlled jury discretion. First, the trial court properly explained the deterrent and punishment purposes of punitive damages. *Id.* at 1044. Second, both the trial court and the appellate court applied independent substantive criteria of review required by Alabama law (even to the extent of considering evidence that was not before the jury) to ensure that the award was reasonable in amount and rational in light of the purposes of punitive damages to punish and deter. *Id.* at 1044-1045. The Supreme Court held that this post-trial review of punitive damage awards, in conjunction with a proper instruction to the jury, provided an adequate constraint on jury discretion to satisfy due process. Therefore, a "preponderance of the evidence" burden of proof was acceptable. *Id.* at 1046 n. 11.

In *Haslip,* the punitive damages were awarded in state court and the post-judgment review was conducted by state courts. In a diversity case in federal court, a district court must apply the substantive law of the state when instructing the jury on punitive damages. *See Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The standards for post-judgment review, however, are supplied by federal law. Post-judgment review by the district judge is governed by standards established for applying Rules 50(b) (directed verdict and j.n.o.v.) and 59 (new trial). Therefore, federal court review of a punitive damage award in a diversity case involves application of the constraints placed on jury discretion both by state substantive law and by the standards governing federal post-trial review.

> Review of the District Court's order involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law pro-

> vides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.

Browing-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S.Ct. 2909, 2922, 106 L.Ed.2d 219 (1989).

Therefore, I must determine whether there were sufficient constraints on jury discretion in this case.

I instructed the jury substantially in compliance with the law of Missouri. Instruction 15 informed the jury that (i) the imposition of punitive damages was not mandatory, (ii) the purpose of punitive damages was to punish and to deter Jacobs and others from like conduct and (iii) whichever fraudulent misrepresentations(s) the jury believed were made had to amount to "outrageous conduct" resulting from an "evil motive or reckless indifference to the rights of others." Although Instruction 15 gives adequate guidance to the jury in determining whether to award any punitive damages, it fails to give the jury guidance about how to determine the amount. (*See, e.g.*, the last paragraph of the instruction to the jury in *Haslip*, 111 S.Ct. at 1037 n. 1: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.") Consequently, the substantive constraints placed by Missouri law upon this jury do not satisfy due process.

d. *Under the Standard of Review Required by Due Process, the Punitive Damage Award Must be Vacated for Lack of Evidentiary Basis*

Turning to the constraints on jury discretion by post-trial review by this court and the Court of Appeals, the Supreme Court has described the district court's role in reviewing a punitive damages award:

> In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. Courts of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

Browing-Ferris, 492 U.S. at 279, 109 S.Ct. at 2922.

Federal court post-judgment review under Rules 50(b) and 59 is more deferential to jury verdicts than post-judgment review in Alabama. Under Rule 50(b), judgment notwithstanding the verdict should be granted only when the evidence, viewed in the light most favorable to the prevailing party, "points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Charles Woods Television Corp. v. Capital Cities/ABC, Inc.*, 869 F.2d 1155, 1159-1160 (8th Cir.), *cert. denied*, 493 U.S. 848, 110 S.Ct. 145, 107 L.Ed.2d 104 (1989). Under Rule 59, a new trial may not be granted on the ground that a jury's verdict is excessive unless the court concludes that the jury's verdict is a "plain injustice" or a "monstrous" or "shocking" result. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470, 475 (8th Cir.1987). In light of *Haslip*, does review under these standards provide sufficient restraint on the jury's discretion to satisfy due process?

In order for post-trial review in this case to be "meaningful and adequate" and, therefore, an additional check on the jury's discretion, consideration must be given to those aspects of the Alabama review process that the Supreme Court in *Haslip* concluded provided meaningful review.

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 111 S.Ct. at 1045.

I am persuaded that if post-judgment review of punitive damage awards in diversity cases is to be a meaningful restraint on a fact finder's discretion, factors such as these must be utilized in post-judgment review. If they are, the heightened standard of proof proposed by Jacobs is not necessary. If they are not, a heightened standard of proof is necessary to afford plaintiff due process.

For the reasons already discussed in this opinion, the issue of punitive damages never should have been presented to the jury because, as a matter of law, defendant's counterclaim for fraudulent misrepresentation should not have been submitted to the jury. Even if the fraudulent

misrepresentation claim had been properly submitted, punitive damages of $2.7 million dollars in this case can only be the result of passion and not the result of the exercise of reasoned discretion. A reasonable mind reviewing this evidence could not find "reckless disregard (from which evil motive is inferred)" for the consequences of plaintiff's behavior with regard to the distributorship relationship with defendant.

Each year the defendant, through its highly educated, experienced president, with ready access to legal counsel, agreed in writing to the terms that would govern the business relationship with plaintiff. In each of the yearly agreements, Brown agreed that the agreement would only be one year in duration and that the written agreement contained all the parties' promises to each other. In this case, defendant's position was that the terms of its solemn, written agreement were meaningless. Instead of the written agreement, defendant contended that it took sales talk, *e.g.*, "we expect our relationship to last forever," as a promise and relied upon it over the terms of the written agreement. Under these facts, a reasonable jury could not fairly conclude that plaintiff's conduct was either outrageous or so reckless as to permit an inference of evil motive.

Also, the amount of punitive damages awarded by the jury was so unrealistic as to demonstrate irrational rather than reasonable behavior. If defendant suffered any harm, it was the result of causes such as poor economic conditions or poor management rather than plaintiff's behavior. A punitive damage award of $2.7 million dollars in addition to a judgment for all the actual damages claimed by defendant bears no rational relationship to the harm likely to result or to the harm that actually occurred.

2. Equal Protection

a. *Missouri Standards for the Assessment of Punitive Damages Do Not Violate the Equal Protection Clause*

Jacobs makes two arguments to support its assertion that punitive damages, as currently imposed, violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. First, Jacobs asserts that punitive damages are penal in nature and serve the same functions as criminal punishment. Jacobs argues that because none of the procedural safeguards afforded to criminal defendants are afforded to punitive damages defendants,[4] punitive damages defendants are discriminated against in relation to criminal defendants.

The action of state courts and of judicial officers in their official capacities is action of the state within the meaning of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14, 15, 18, 68 S.Ct. 836, 842, 843, 844, 92 L.Ed. 1161 (1948). The action of state courts in enforcing a substantive common-law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings may have been in complete accord with the most rigorous conceptions of procedural due process. *Shelley*, 334 U.S. at 17, 68 S.Ct. at 844.

Generally, the constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16 (1973). State action is subjected to a higher level of scrutiny only if the classification interferes with the exercise of a fundamental right, *e.g.*, the right of privacy, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

[4] Jacobs does not specify which procedural protections, being absent, require a finding of unconstitutionality.

(1973); the right to vote, *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); rights guaranteed by the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); or the right to procreate, *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), or operates to the peculiar disadvantage of a suspect class, *e.g.*, alienage, *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); race, *McLaughlin v. State of Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); or ancestry, *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948).

Defendants against whom punitive damages are sought do not constitute a suspect class. No fundamental rights of the type discussed in the decisions in this area are implicated by the imposition of punitive damages. Thus, "rational basis" is the appropriate constitutional standard to be applied here. *San Antonio*, 411 U.S. at 55, 93 S.Ct. at 1308.

Punishment and deterrence of outrageous conduct inspired by an evil motive or reckless indifference to the rights of others are legitimate state state interests, and the imposition of punitive damages rationally furthers these interests.

As the predicate for Jacobs' second argument, Jacobs asserts that recovery of additional damages in some categories of civil cases, such as antitrust, is limited to a *multiple* of compensatory damages, whereas the recovery of punitive damages awards in other categories of civil cases is *unlimited*. Therefore, Jacobs argues that defendants against whom punitive damages are sought in the latter cases are discriminated against as compared to "additional damages" defendants in the former cases. Jacobs asserts that there is no rational basis for such discrimination.

Again, defendants against whom punitive damages are sought do not constitute a suspect class and no fundamental rights are implicated by the imposition of punitive damages.

On the record presented, I cannot say that the state's purposes in allowing punitive damages to be assessed are not rationally furthered by Missouri's decision not to place a cap on punitive damage awards. Any cap might prevent the purposes of punitive damages from being realized when the defendant is wealthy. A mandatory multiplier might be ineffectual when the other damages are nominal. Missouri's failure to put a cap on the amount of punitive damages that may be awarded by a jury rationally furthers the interests of punishment and deterrence.

Jacobs' equal protection challenge is meritless.

G. *Conclusion*

Jacobs' motions for directed verdict and judgment notwithstanding the verdict on Brown's claim for fraudulent misrepresentation will be granted because Brown failed to present evidence sufficient to support each element of the claim. Jacobs' motions for directed verdict and judgment notwithstanding the verdict on Brown's claim for negligent misrepresentation will be granted because no cause of action exists for negligent misrepresentation of future intent. Assuming that a cause of action for negligent misrepresentation of future intent exists, Brown failed to present evidence sufficient to support each element of the claim.

Even if Brown had presented evidence sufficient to support a claim of fraudulent misrepresentation and/or a claim for negligent misrepresentation of future intent existed and was supported, 1) the jury's award of lost future profits will be vacated because no reasonable jury could find on the basis of the evidence presented that the claimed lost profits were proximately caused by any of

Jacobs' alleged misrepresentations; 2) the jury's award of punitive damages will be vacated because Instruction 15 did not properly inform the jury about Missouri's standards for determining the amount of punitive damages; and 3) the jury's award of punitive damages will be vacated because no reasonable jury could conclude that plaintiff's conduct was either outrageous or so reckless as to permit the inference of an evil motive.

II. MOTION FOR NEW TRIAL

Jacobs has moved for a new trial as an alternative to its motion for judgment notwithstanding the verdict. Having granted Jacobs' Motion for Judgment Notwithstanding the Verdict, it is unnecessary to rule on Jacobs' Motion for a New Trial. However, in order to facilitate complete review on appeal, I will rule on the new trial motion.

A. *Standard of Review*

A new trial may be granted if there is not substantial evidence to support the verdict. A new trial should be granted to prevent a miscarriage of justice. *California & Hawaiian Sugar*, 602 F.Supp. at 186.

The burden of proving harmful errors is on the party seeking the new trial. *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179 (8th Cir.1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1371, 35 L.Ed.2d 592 (1973). In considering a motion for a new trial, the evidence need not be viewed in the light most favorable to a nonmoving party. *Bates v. Hensley*, 414 F.2d 1006, 1011 (8th Cir.1969). In order to grant a new trial, I must conclude that the jury reached a seriously erroneous result. *Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir.1990).

Although I have discretion to grant a new trial based upon my assessment of the evidence, I "cannot usurp the functions of the jury. The district court can only disturb a jury verdict to prevent a miscarriage of justice. The

verdict must be against the 'clear weight,' 'overwhelming weight,' or 'great weight' of the evidence for a new trial to be granted." *Beckman v. Mayo Foundation*, 804 F.2d 435, 439 (8th Cir. 1986).

Jacobs asserts four grounds for a new trial: 1) the jury's verdict for actual and punitive damages was without any evidentiary basis, 2) the jury's verdict was erroneously inconsistent, 3) the jury's findings set forth in special interrogatories were without evidentiary basis, and 4) the Court erroneously allowed Brown's waived claim for monetary losses for the Southern Region to go to the jury. With the exception of the initial Suggestions in Support of Jacobs' motion, the parties discussed the issues raised by the new trial motion (if they were discussed at all) along with the issues raised by the Motion for Judgment Notwithstanding the Verdict. Similarly, my analysis of the issues raised by the Motion for Judgment Notwithstanding the Verdict reliably predicts the outcome of the new trial motion even under the different standard.

B. *Punitive Damages Verdict Lacked Evidentiary Basis*

Jacobs contends that the jury's verdict for actual and punitive damages was without any evidentiary basis and, therefore, was rendered because of bias or prejudice and/or because of the jury's failure to follow the court's instructions. For all of the reasons previously discussed, there was not substantial evidence supporting the award of punitive damages.

C. *The Verdict was Erroneously Inconsistent*

Jacobs contends that the jury's verdict was erroneously inconsistent in that representation "c" in Instructions 12 and 13 (referred to in this opinion as the third alleged misrepresentation) was found to be both a fraudulent and negligent misrepresentation. Jacobs argues that this dem-

onstrates that the jury was biased or prejudiced and/or that it failed to follow the court's instructions.

Any single representation cannot be both fraudulent and negligent because of the difference between the scienter element of these distinct legal theories. "[T]he theories underlying fraud and negligence are antithetical. An act or failure to act cannot be both intentional and unintentional." *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1374 (8th Cir.1989); *see also Restatement (Second) of Torts*, § 528 (1977).

Special answers or findings by the jury must be consistent with each other, and if they are irreconcilably inconsistent, they destroy each other.[5] *Robertson*, 871 F.2d at 1373. In this situation, both the negligence and the fraud verdicts must be vacated and the issues re-tried. *Id.* at 1375.

Here, because the jury found the third alleged misrepreesntation to be both fraudulent and negligent, Jacobs is entitled to a new trial on that representation.

D. *Jury's Findings as to Brinkerhoff and Kennedy Lacked Evidentiary Basis*

Jacobs contends that the jury's findings set forth in the Court's special interrogatories submitted as Instructions 22 and 23, which identified P. Brinkerhoff and E. Kennedy as Jacobs' employees who satisfied paragraph Third and Fourth of Instructions 12 and 13, respectively, were without evidentiary basis. Therefore, Jacobs argues that the jury's verdict was rendered because of bias or prejudice and/or because of the jury's failure to follow the Court's instructions.

Defendant points to no specific evidence about Brinkerhoff or Kennedy that would support the jury's conclusion.

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[5] In *Robertson*, as here, the jury was not instructed that it could return a verdict on only one of the two theories. *See Robertson*, 871 F.2d at 1375.

Defendant argues that the jury's conclusion was supported by the position each held with Jacobs.

Although I do not have a transcript of the proceedings, my notes and recollection of the evidence support Jacobs' conclusion that there was no evidence from which a reasonable jury could conclude that the evidence about Brinkerhoff and Kennedy satisfied paragraphs Third and Fourth of Instructions 12 and 13. Neither Brinkerhoff nor Kennedy's position with Jacobs by itself provides a sufficient evidentiary basis for the jury's conclusion.

Jacobs does not challenge the adequacy of the evidentiary basis for the jury's conclusion about the other men listed by the jury in response to Instructions 22 and 23. However, the jury's inclusion of Brinkerhoff and Kennedy in its responses to these Special Interrogatories is another indication that the jury was not following instructions but was proceeding by emotion. When asked to respond to Instructions 22 and 23, the jury may well have listed all the names of Jacobs' employees which they could remember. Although this ground by itself would not warrant a new trial, it supports the grant of a new trial based on other grounds.

E. *Brown Did Not Waive Claim For Southern Region Losses*

Jacobs contends that counsel for Brown waived in his opening statement any claim by Brown for damages for alleged monetary losses in the southern region. Therefore, Jacobs argues that there was no lawful evidence supporting the jury's award of such damages.

For the reasons already discussed in this order, it was not error to submit this claim to the jury and there was substantial evidence to support the jury's decision.

F. *Conclusion*

For all of the reasons set forth in this opinion, the jury reached a seriously erroneous result in this case un-

der the evidence presented to it. Emotion rather than reason appears to have directed this jury. In fact, defendant's case on its counterclaim appeared to be based to a large extent on appeals to emotion as a means of avoiding the terms of written agreements. Repetition of concepts like small company versus big company, local company versus foreign company and "boilerplate" distracted the jury from a rational consideration of the evidence and from a careful application of the law as stated in the instructions.

III. ORDER

For the foregoing reasons, it is ORDERED that:

1) Jacobs' Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict on Defendant's Counterclaim for Fraud and Negligent Misrepresentation is granted; and

2) in the alternative, Jacobs' Motion for New Trial is granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1834WMKC

THE JACOBS MANUFACTURING COMPANY,
Appellee,

v.

SAM BROWN CO.,
Appellant.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Beam would grant the suggestion.

The petition for rehearing by the panel is also denied.

June 27, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus
Clerk
U.S. Court of Appeals
Eighth Circuit